DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-350
Title: Los Angeles County, California, Petitioner
v.
Craig Arthur Humphries, et ux.
Docketed: September 23, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-56467)
Decision Date: June 22, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 21 2009	Petition for a writ of certiorari filed. (Response due October 23, 2009)
Oct 23 2009	Order extending time to file response to petition to and including November 23, 2009.
Nov 23 2009	Brief of respondent Craig Arthur Humphries, and Wendy Dawn Aborn Humphries in opposition filed.
Dec 4 2009	Reply of petitioner County of Los Angeles, California filed.
Dec 9 2009	DISTRIBUTED for Conference of January 8, 2010.
Jan 11 2010	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	DISTRIBUTED for Conference of January 22, 2010.
Feb 16 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 22 2010	Petition GRANTED limited to Question 1 presented by the petition.
Mar 10 2010	Motion to dispense with printing the joint appendix filed by petitioner County of Los Angeles, California.
Mar 22 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 29 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including April 23, 2010.
Apr 23 2010	Brief of petitioner County of Los Angeles, California filed.
May 14 2010	The time within which to file respondents' brief on the merits is extended to and including June 21, 2010.
Jun 17 2010	The time within which to file respondents' brief on the merits is further extended to and including June 28, 2010.
Jun 28 2010	Brief of respondents Craig Arthur Humphries, and Wendy Dawn Aborn Humphries filed.
Jul 20 2010	SET FOR ARGUMENT ON Tuesday, October 5, 2010.
Jul 26 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Jul 28 2010	Reply of petitioner County of Los Angeles, California filed.
Jul 29 2010	CIRCULATED.
Jul 29 2010	Record received from U.S.D.C. for the Central District of CA. (2 boxes)
Sep 7 2010	Justice Kagan is recused in this case.
Oct 5 2010	Argued. For petitioner: Timothy T. Coates, Los Angeles, Cal. For respondents: Andrew J. Pincus, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-350 SEP 21 2009

OFFICE OF THE CLERK

In The Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

CRAIG ARTHUR HUMPHRIES and
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from *Monell's* requirement as determined by the Ninth Circuit?

2. May a plaintiff be a prevailing party under 42 U.S.C. §1988 for purposes of a fee award against a local public entity based upon a claim for declaratory relief where the plaintiff has not demonstrated that any constitutional violation was the result of a policy, custom or practice attributable to the public entity under *Monell*?

3. May a plaintiff be a prevailing party on a claim for declaratory relief for purposes of a fee award under 42 U.S.C. §1988 where there is neither a formal order nor judgment granting declaratory relief, nor any other order altering the legal relationship between the parties in a way that directly benefits the plaintiff?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Craig Arthur Humphries and Wendy Dawn Aborn Humphries, plaintiffs, appellants below, and respondents here.
- The County of Los Angeles, defendant, appellee below, and petitioner here.
- Bill Lockyer, Attorney General, in his official capacity as Attorney General of the State of California, defendant, appellee below, and respondent here.

In addition Leroy Baca, Michael Wilson, and Charles T. Ansberry were defendants in the underlying action, appellees in the proceedings below, but not parties to the fee order that is subject to this petition.

There are no corporations involved in this proceeding.

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OPINIONS BELOW

The June 22, 2009 order of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition was not reported and is found in the Appendix ("App.") at 1-4. The Ninth Circuit's initial opinion in the underlying appeal was published at 547 F.3d 1117 (9th Cir. 2008), but was subsequently withdrawn from the official bound volume and can be found in the Appendix at pages 143-209. The Ninth Circuit's order of January 15, 2009 amending opinion and order denying appellee County of Los Angeles' petition for rehearing and rehearing en banc, denying appellee Bill Lockyer's petition for rehearing and rehearing en banc, granting appellants' motion for clarification in part, appellants' petition for rehearing or reconsideration and amended opinion is not published in the official reports and is found in the Appendix at pages 73-142. The Ninth Circuit's second order amending opinion and amended opinion of January 30, 2009 is published in the official reports at 554 F.3d 1170 (9th Cir. 2009) and is found in the Appendix at pages 5-72.

The decision of the district court, granting in part and denying in part, defendants' motions for summary judgment was not reported, and is found in the Appendix at pages 210-54.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on November 5, 2008. (App.143.) Petitioner and each of the respondents filed petitions for rehearing. On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of petitioner County of Los Angeles and respondent Bill Lockyer, and granting in part plaintiffs' petition for rehearing as well as plaintiffs' motion for clarification and issued its amended opinion. (App.73.) After petitioner filed a motion to correct a misstatement in the amended opinion, on January 30, 2009, the Ninth Circuit issued its second order amending the opinion as well as an amended opinion. (App.5-72.) Following respondent Humphries' motion for attorney's fees on appeal and the filing of opposition by petitioner County of Los Angeles and respondent Bill Lockyer, on June 22, 2009, the Ninth Circuit issued its order finding plaintiffs to be prevailing parties for purposes of an attorney fee award, directing that any fees be split 90/10 between the State and the County, and remanding to the Appellate Commissioner for a report and recommendation concerning only the amount of fees. (App.1-4.)

28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of certiorari the June 22, 2009 order of the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents pursuant to 42 U.S.C. §1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The June 22, 2009 order of the Ninth Circuit was made pursuant to 42 U.S.C. §1988(b) which provides as follows:

> In any action or proceeding to enforce a provision of §§1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §1681, et seq.], the

> Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. §2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.] or §1983 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, such officer shall not be held liable for any costs including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The Humphries respondents allege that petitioner County of Los Angeles, as well as respondent State of California, through its then Attorney General Bill Lockyer, violated their rights under the Fourteenth Amendment to the United States Constitution, the relevant part of which reads as follows:

> ***Fourteenth Amendment (Section I):*** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Background And District Court Proceedings.

This action arose from investigation of allegations of child abuse concerning plaintiffs and respondents Craig Arthur Humphries and Wendy Dawn Aborn Humphries. Based upon reports received from another police agency that had spoken with the plaintiffs' 15-year-old daughter, who reported she had been physically abused by the plaintiffs, as well as hospital reports confirming that she had been a victim of "non-accidental trauma," Los Angeles County Sheriff's officers procured an arrest warrant for the plaintiffs for felony torture. (App.18-19.) A Sheriff's Deputy then picked up the Humphries' two other minor children from school and placed them in protective custody. (App.19.)

Based on the provisions of Child Abuse and Neglect Report Act ("CANRA"), California Penal Code, §§11164-11174.3, Sheriff's Detective Michael Wilson completed a child abuse investigation report identifying the Humphries' case as a "substantiated report" of child abuse and forwarded the information to the California Department of Justice, which in turn placed the Humphries in the Child Abuse Central Index or CACI. (App.20.) The CACI listing

identified the Humphries as child abuse suspects with a "substantiated" report. (*Id.*)

Criminal proceedings were then instituted against the Humphries, but subsequently dismissed. (App.20-21.) The Humphries successfully petitioned the criminal court under California Penal Code, §851.8 for orders finding them "factually innocent" of the felony torture charge and requiring the arrest records pertaining to that charge be sealed and destroyed. (App.21-23.) Dependency proceedings concerning the Humphries' children were also subsequently dismissed, the court finding the counts of child abuse to be "not true." (App.23.)

Plaintiffs filed a federal action naming as defendants petitioner County of Los Angeles ("the County"), the Sheriff of the County, various Sheriff's employees, as well as the State of California through Attorney General Bill Lockyer. In their operative first amended complaint, plaintiffs asserted three federal claims for relief. Two claims arose from the plaintiffs' initial arrest and the subsequent dependency proceedings. (App.27.) The remaining federal claim, and the one that forms the basis for the fee order that is the subject of this petition, concerned plaintiffs' placement on the CACI and inability to have themselves removed from the Index. (App.27-28.) Plaintiffs asserted that the absence of any effective means to remove their names from the database constituted a violation of due process. (App.28.) To that end, plaintiffs sought declaratory and injunctive relief as well as damages from the State and from the County

based upon the alleged deprivation of their rights. (*Id.*)

With respect to plaintiffs' due process claim challenging CANRA and CACI, the County moved for summary judgment under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), arguing plaintiffs could not establish the threshold requirement of a constitutional violation because the procedures did not violate due process. (App.225-26.) The State of California also moved for summary judgment based upon the constitutionality of CANRA and CACI. (*Id.*) The district court granted defendants summary judgment on plaintiffs' due process claim as to CANRA and CACI. (App.244-45.)

B. The Appeal.

Plaintiffs appealed the district court's dismissal of their due process claims for injunctive, declaratory and damages relief stemming from inclusion in the CACI. On November 5, 2008, the Ninth Circuit issued an opinion reversing the judgment as to the County and the State. (App.143.) The court found that CANRA and CACI did not afford due process with respect to allowing those listed in the database to be removed once charges had been determined to be unfounded. (App.205-06.) As to the County, the court observed that unlike the individual defendants, it was not entitled to qualified immunity. (App.208.) The court acknowledged the County could only be subject to liability under *Monell* if a policy or custom deprived the Humphries of their constitutional rights.

(*Id.*) The court noted that the district court "did not address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights." (*Id.*) It then stated that in order to avoid summary judgment, a plaintiff need only show there was a question of fact regarding whether a city, custom or policy caused a constitutional violation. (App.209.) The court then noted that while CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing in the Index, nothing in CANRA "prevented the LASD (Los Angeles County Sheriff's Department) from creating an independent procedure that would allow the Humphries to challenge their listing on the Index" and therefore "LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County's summary judgment on this issue." (*Id.*)

The County of Los Angeles petitioned for re-hearing, noting that the question of whether the actions of its Sheriff's Department personnel with respect to the CACI was the result of a custom, policy or practice fairly attributable to the County under *Monell* had not been litigated in the motion for summary judgment or on appeal. Summary judgment had been granted solely on the basis that there was no constitutional violation in the first instance. (App.245.) The County observed that under California authorities, it was not free to alter the State's statutory scheme governing inclusion or removal from the CACI, and hence, at the very least, the question whether the County could be held responsible for any

constitutional violation under *Monell* was an open question yet to be litigated. The other parties filed petitions for rehearing as well.

On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of the County and the State and granting in part and granting plaintiffs' petition for rehearing and motion for clarification. (App.73.) The court repeated its conclusion that CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the CACI, and that nothing in CANRA prevented the County Sheriff's Department from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. (App.142.) It stated that "[b]y failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to *qualified immunity*. (*Id.*; emphasis added.)

Since the opinion previously noted that the County as a public entity was not entitled to invoke "qualified immunity," the County filed a request for the court to correct what appeared to be an error in the opinion. The County suggested that the court had inadvertently substituted the phrase "qualified immunity" for "*Monell*" liability and submitted proposed language to correct the mistake.

On January 30, 2009, the court issued a second order amending the opinion as well as an amended opinion. (App.5, 7.) As to the County's *Monell* liability, the court repeated its earlier conclusion that it was possible that the County Sheriff's Department had adopted a custom and policy that violated the Humphries' constitutional rights and remanded "to the district court to determine the County's liability under *Monell*." (App.72.) In the disposition of the case, the court stated: "For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. §1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion." (*Id.*)[1]

C. The Ninth Circuit Determines Plaintiffs Are Prevailing Parties For Purposes Of A Fee Award.

Plaintiffs filed a motion for attorney's fees on appeal, arguing that they were prevailing parties given the court's determination that the State statutory scheme under CANRA and CACI violated their rights to due process and that the County did not create additional procedural protections in order

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[1] The court, as it did in its prior opinions, affirmed the grant of summary judgment to the individual defendants based on qualified immunity. (App.72.)

to prevent their constitutional injury. Plaintiffs sought $652,000 as Lodestar attorney's fees and a 2.0 multiplier.

The County opposed the motion for attorney's fees, arguing, among other grounds, that plaintiffs had not prevailed as against the County in that as the opinion recognized, plaintiffs still had to prove that the constitutional violation at issue was the result of a custom, policy or practice attributable to the County under *Monell*. The County also noted that plaintiffs had not sought or obtained summary judgment with respect to their claims for declaratory relief and that in fact no judgment for declaratory relief existed. Rather, the court had simply remanded to the district court for further proceedings consistent with the opinion.

On June 22, 2009, the Ninth Circuit issued its order determining that plaintiffs were prevailing parties for purposes of a fee award as against both the State and the County. (App.1-4.) Citing earlier Ninth Circuit authority, the court held that neither a formal order nor judgment for declaratory relief was necessary for purposes of a fee award. (App.2.) It concluded that its opinion finding that the County might have provided additional procedural protections "materially affected" the relationship between the parties so as to justify a fee award. (*Id.*) The court also found that based upon its earlier decisions in *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989) and *Truth v. Kent School District*, 542 F.3d 634, 644

(9th Cir. 2008), the "limitations to liability established in *Monell* do not apply to claims for prospective relief." (App.4.) Hence, plaintiffs' failure to establish the County's *Monell* liability did not impact whether plaintiffs were prevailing parties for purposes of a fee award. (*Id.*) The court concluded, however, that because of the County's relatively minor role in the procedural scheme, it would only be liable for 10% of any attorney's fees. (*Id.*) The court directed the Appellate Commissioner to issue a report and recommendation solely concerning the amount of reasonable fees. (*Id.*)

REASONS TO GRANT THE PETITION

Review is necessary to resolve an express circuit conflict concerning whether this court's decision in *Monell v. Department of Social Services* applies to claims for declaratory and other prospective relief. Four circuits – the First, Second, Fourth and Eleventh Circuits – have held that *Monell* necessarily applies to claims for declaratory and prospective relief, relying on the plain language of *Monell* itself where the Court stated:

> [L]ocal governing bodies . . . can be sued directly under §1983 for monetary, *declaratory*, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially

> adopted and promulgated by that body's officers.

436 U.S. at 658, 690 (1978) (emphasis added).

Despite this clear language in *Monell*, and the absence of any suggestion in this Court's post-*Monell* opinions that the requirement of proving custom, policy or practice does not apply to claims for declaratory or other prospective relief against a public entity, the Ninth Circuit alone exempts such claims from *Monell*'s strictures. The result is an end-run around this Court's repeated holdings that a public entity may only be held responsible for inflicting a constitutional injury where the conduct at issue was the result of a custom, policy or practice fairly attributable to the public entity.

The sole rationale offered by the Ninth Circuit for discarding *Monell* is that claims for declaratory and other prospective relief do not result in the sort of financial burdens imposed by damages awards, which it perceived as the basis for *Monell*'s rejection of *respondeat superior* liability. Yet, *Monell* itself involved claims for injunctive relief as well as damages. Further, it is untenable to suggest, as the Ninth Circuit does, that claims for declaratory and injunctive relief do not impose financial burdens on local public entities. This case underscores the very point – the Ninth Circuit has held the County will be liable for at least 10% of a fee award that could range up to $1.3 million, all without any determination that the particular conduct at issue was actually the result

of a policy, custom or practice attributable to the County. Moreover, other claims for prospective relief, most specifically injunctive relief, can often lead to institutional or other changes, such as reinstatement of an employee, that impose a significant financial burden on a defendant public entity.

Local public entities are routinely confronted with claims for prospective relief under §1983. As this case illustrates, since they are inevitably tasked to enforce state laws which they have no power to change, they are typically on the frontlines of any constitutional challenges to such statutory schemes, challenges that necessarily seek declaratory and injunctive relief. It is essential that this Court grant certiorari in order to resolve the conflict between the Ninth Circuit and the First, Second, Fourth and Eleventh Circuits, concerning this important and recurring issue and direct the Ninth Circuit to follow this Court's decision in *Monell*.

Review is also necessary because the Ninth Circuit's order determining plaintiffs to be prevailing parties on their claim for declaratory relief flies in the face of this Court's decisions making it clear that mere adjudication of a question in a vacuum, without a specific order and judgment changing the relationship between the parties, is not sufficient to convey prevailing party status for purposes of a fee award under 42 U.S.C. §1988. In *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988), the court expressly limited prevailing party status to those litigants who, even in the context of declaratory

relief, obtain a favorable judicial determination on an issue that affects the behavior of the defendant toward the plaintiffs. That is simply not the case here.

The Ninth Circuit's opinion did not reverse the judgment with directions to enter judgment for plaintiff on the declaratory relief claim. It simply remanded for further proceedings "consistent with this opinion." (App.72.) In its June 22, 2009 order finding plaintiffs to be prevailing parties, the court noted that under Ninth Circuit authority it could award attorney's fees for a claim of declaratory relief even in the absence of a specific judgment, and recast its prior opinion as the equivalent of a judgment for the declaratory relief in favor of the plaintiffs. (App.3-4.) But the court did not explain how any such "judgment" affected the relationship between the parties, since the court acknowledged that the County's *Monell* liability for purportedly not creating additional procedural protections remained at issue. In sum, how can the County's behavior towards the plaintiffs be materially affected when it cannot be determined that the County's behavior has any relationship to the violation at issue in the first place?

The Ninth Circuit's clear departure from this Court's decisions in *Hewitt*, and *Rhodes* limiting fee awards to those parties who obtain material relief through a formal judgment, must be corrected by this court. For this reason too, review is necessary.

I. REVIEW IS NECESSARY TO RESOLVE THE EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE OF WHETHER *MONELL* APPLIES TO CLAIMS FOR PROSPECTIVE RELIEF.

A. *Monell* Establishes That A Plaintiff May Only Obtain Redress – Whether In The Form Of Damages Or Prospective Relief – Where The Constitutional Injury Is The Result Of A Custom, Policy Or Practice Attributable To The Local Public Entity.

In *Monell v. Department of Social Services*, 436 U.S. 658, 690, this Court held that Congress intended "municipalities and other local government units to be included among those persons to whom §1983 applies." In so holding, the court noted that both the legislative history of §1983 as well as its plain terms foreclosed allowing redress against a local public entity based upon the doctrine of *respondeat superior*. *Id.* at 693. Rather, it is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* at 694.

Monell itself stemmed from a district court's refusal to grant an injunction directing payment of back pay to the plaintiffs on the ground that the municipality could not be subject to suit under §1983.

Id. at 661-62. Since the claim arose in the context of equitable relief, this Court, not surprisingly, did not limit its holdings to claims for damages but, rather, made it clear that it applied to all claims for redress of any kind under §1983:

> Local governing bodies ... can be sued directly under §1983 for monetary, *declaratory*, or *injunctive* relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

436 U.S. at 690 (emphasis added).

The breadth of the court's holding was dictated by the plain language of §1983 as originally enacted, which provided that,

> "[*A*]*ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, *suit in equity*, or other proper proceeding for redress. ..."

Monell, 436 U.S. at 691 (quoting 17 Stat. 13) (emphasis added).

Thus, as the court concluded in *Monell*, under the terms of §1983, both as originally enacted and in its present form, claims against a local public entity are subject to the requirement that there be a constitutional injury inflicted as a result of conduct fairly attributable to that public entity, and if such an injury is inflicted, then the public entity may be liable "to the party injured in any action at law, *suit in equity*, or other proper proceeding for redress. . . .'" *Id.* at 692 (emphasis added). The full panoply of remedies under §1983, including equitable or other relief, are therefore available against public entities, subject to the requirement that the injury they purport to redress was inflicted as a result of a policy, custom or practice of the public entity.

Following *Monell*, this Court has repeatedly emphasized that the custom, policy or practice requirement is a rule of causation compelled by §1983 itself. *See*:

- *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ["municipal liability is limited to action for which the municipality is actually responsible"];
- *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) ["For our purposes here, the crucial terms of the statute are those that provide for the liability when a government 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of constitutional rights. Aware that governmental bodies can act only

through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights"];

- *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) ["It is only when the 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under §1983"];

- *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) ["(i)n *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under §1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury"];

- *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 785 (1997) ["we held in *Monell* . . . that a local government is liable under §1983 for its policies that cause constitutional torts. These policies may be set by the government's lawmakers, 'or by those whose edicts or acts may fairly be said to represent official policy' "].

Nothing in *Monell*, or any of its progeny, even remotely suggests that §1983's requirement that a plaintiff prove that he or she suffered a deprivation of rights caused by the defendants' conduct would vary

depending upon the type of redress sought. Nonetheless, the Ninth Circuit, standing alone, has carved out an exception for claims for declaratory and other prospective relief that is inconsistent with the plain language of §1983, this Court's decision in *Monell* and in subsequent cases, as well as the decisions of its sister circuits.

B. The Ninth Circuit Departs From *Monell* In Concluding That A Claim For Declaratory Or Other Prospective Relief Is Not Subject To The Requirement That The Underlying Injury Result From A Policy, Custom Or Practice Of A Local Public Entity.

As the Ninth Circuit noted in its order declaring the plaintiffs to be prevailing parties with respect to their declaratory relief claim for purposes of a fee award, it is settled law in that circuit that such claims are not subject to *Monell*. (App.3-4.) In *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989), the court held that plaintiffs challenging state procedures concerning post-judgment garnishment could properly hold the County Sheriff liable in his official capacity for purposes of declaratory relief, without showing that the underlying constitutional violation was "inflicted pursuant to an official county policy."

In so holding, the court focused on this Court's discussion in *Monell* regarding the financial burden that *respondeat superior* liability would impose on

public entities. *Id.* The Ninth Circuit stated: "We find no persuasive reasons for applying the Court's 'official policy or custom' requirement to suits against counties only for prospective relief. The justification for limiting an action for damages is notably absent when the relief sought is an injunction halting the enforcement of an unconstitutional state statutory scheme." *Id.* at 251.

The Ninth Circuit explained:

> *Monell* does not apply here. Unlike *Monell*, this case presents *solely* a claim for prospective relief. Appellants sought only a declaration that the Idaho post judgment garnishment procedures are unconstitutional and an injunction against the counties' enforcement of the challenged state statutes. We conclude that the Court did not intend to apply any 'official policy or custom' requirement to foreclose a suit for prospective relief against a county or its officials for enforcing allegedly unconstitutional state laws.

Id. at 250.

As the order at issue here underscores, the Ninth Circuit has consistently reaffirmed *Chaloux's* misguided interpretation of *Monell*. *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644 (9th Cir. 2008) ["*Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here]; *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993) ["the City can be subject to prospective injunctive relief even if the constitutional

violation was not the result of an 'official custom or policy' "].

Tellingly, even within the Ninth Circuit there is a recognition that *Chaloux* is manifestly inconsistent with the plain language of *Monell* and this Court's subsequent decisions. *See Truth*, 542 F.3d at 644 [observing that the district court urged that *Chaloux* be overruled because it "'rests on shaky grounds,'" but noting that since the Court's post-*Monell* cases do not specifically address "whether *Monell* applies to actions only seeking prospective relief," the panel had "no authority to overrule *Chaloux*"]; *Los Angeles Police Protective League*, 995 F.2d at 1472 n.1 [noting that in the "concurrence there is a suggestion that *Chaloux* was wrongly decided" but finding that "(h)owever meritorious this argument may be, we are bound by *Chaloux*. . . ."].

Indeed, as the concurring opinion in *Los Angeles Police Protective League* observed:

> *Chaloux* held that the official policy or custom requirement of *Monell* does not apply to suits against municipalities that seek only prospective relief. [Citation.] This holding is in conflict with *Monell*. *Monell* does not distinguish among cases based on the type of relief sought; it simply holds that a municipality may not be sued *at all* unless the challenged conduct represents the official policy or custom of the municipality. . . .

Id. at 1477 (emphasis in original).

Thus, even within the Ninth Circuit, it appears manifest that the underlying reasoning of *Chaloux* does not withstand scrutiny. In neither *Chaloux* nor any other case has the Ninth Circuit offered any compelling rationale to justify its departure from the plain language of *Monell* and the controlling language of §1983.

1. There is no support for *Chaloux's* assumption that the availability of relief against local public entities under §1983 turns on whether the relief will have a financial impact on the defendant.

As noted, *Chaloux* is premised on the notion that in *Monell* this Court rejected *respondeat superior* liability on the grounds that in enacting §1983, Congress did not want to impose substantial damages liability on local public entities for the misconduct of employees. *Chaloux*, 886 F.2d at 250. Yet, review of *Monell* belies such an interpretation.

There, the Court did not focus on the nature of the relief sought; rather, the Court focused upon whether legislative history indicated that local municipalities could be deemed "persons" under §1983 and if so, how such a public entity could "subject" a person, or "cause [a person] to be subjected" to a deprivation of constitutional or other federal rights. *Monell*, 436 U.S. at 691 (quoting 17 Stat. 13) (emphasis omitted). The Court emphasized that the terms "shall subject, or cause to be

subjected" in §1983 as enacted "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692.

Critically, as the text of §1983 makes plain, once it has been shown that a defendant has caused a violation of federal rights, the plaintiff can obtain appropriate "redress" through "any action at law, *suit in equity*, or other proceeding. . . ." *Id.* (quoting 17 Stat. 13) (emphasis added). That is why this Court in *Monell* clearly stated that local governing bodies "can be sued directly under §1983 for monetary, *declaratory*, or *injunctive* relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690 (emphasis added). The question of whether a public entity has subjected a plaintiff to a constitutional injury, i.e., whether a policy, custom or practice inflicted the injury, does not turn upon the nature of the relief eventually sought by the plaintiff.

2. *Chaloux* erroneously assumes that claims for prospective relief can have no financial impact on a public entity.

The premise of *Chaloux* is that in *Monell* this Court rejected *respondeat superior* liability as a basis for a damage claim against a public entity under

§1983 because such suits for damages would result in an onerous financial burden on public entities and hence *Monell* does not impact claims for prospective relief. *Chaloux*, 888 F.2d at 250. As discussed above, that basic proposition is itself untenable. Yet, even the underlying assumption of *Chaloux* – that claims for prospective relief somehow impose no financial burdens on public entity defendants – is manifestly illogical.

For example, here, the Ninth Circuit opines that it has granted declaratory relief to the plaintiff to the effect that CANRA and CACI, as presently constituted, are unconstitutional, and that the County failed to supply its own procedures that might have remedied some of the constitutional deficiencies. (App.1-4.) The court acknowledges both in its underlying opinion and fee order, however, that it is an open question whether the purported failure to provide such policies was attributable to a County policy, custom or practice. (App.4, 72.)[2] Of course, a

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[2] As the County established in its petition for rehearing as to the court's first opinion, under California law local public entities cannot impose their own procedures above those set by State law and federal courts have repeatedly recognized that local public entities cannot be held liable under *Monell* simply for enforcing state law. *See*, *Birkenfeld v. City of Berkely*, 17 Cal.3d 129, 150-52, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) [city could not create additional procedures for unlawful detainer actions]; *American Financial Services Ass'n. v. City of Oakland*, 34 Cal.4th 1239, 1251, 104 P.3d 813, 23 Cal. Rptr. 3d 453 (2005) [city ordinance could not regulate predatory lending practices more stringently than state regulations]; *Surplus Store*

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declaration that a particular statutory scheme is unconstitutional and requires further procedures could lead a defendant to implement such procedures, perhaps at substantial cost, simply to avoid future liability.

Similarly, a prospective injunction, for example, directing a public entity to reinstate a terminated employee, will require the public entity to expend funds in the form of salary or other benefits. Under such circumstances, it is nonsensical to draw a distinction between a prospective injunction requiring reinstatement, and a retrospective injunction directing, for example, payment of back pay. Yet, that is the illogical result that obtains in the Ninth Circuit. *See Los Angeles Police Protective League*, 995 F.2d at 1472 [injunction requiring reinstatement of job and pension rights not subject to *Monell*], and 1472 n.1 [award of back pay may be "equitable relief" but

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& Exch., Inc. v. City of Delphi, 928 F.2d 788, 790-93 & n.4 (7th Cir. 1991) [merely enforcing state law is insufficient to establish a municipal policy under *Monell*]; *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) [county not liable under *Monell* for County Social Services Board's termination of director, where Board "enjoyed its discretion to fire [director] at the prerogative of and within the constraints imposed by the [state]"]; *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) [county not liable under *Monell* for county judge's ministerial role in enforcing unconstitutional state statute]; *Doby v. De Crescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ["when a county is merely enforcing state law, without adopting any particular policy of its own, it cannot be held liable under . . . *Monell*"].

because it is "retrospective relief" it is subject to *Monell* requirements].

Finally, as this case illustrates, a declaratory relief claim can serve as a springboard for a substantial fee award. Plaintiffs are seeking, after application of a multiplier, over $1.3 million in appellate attorney's fees alone.[3] Petitioner County will be subject to at least 10% of whatever amount the Appellate Commissioner determines plaintiffs should recover. It cannot be said that such an award does not have a financial impact on a public entity.

Claims for prospective relief necessarily create economic burdens on defendants. Thus, even utilizing its own reasoning, *Chaloux* does not support an attempt to bypass *Monell* and inflict a substantial cost award on a public entity without any effort to show that the particular constitutional violation in question was the result of a policy, custom or practice attributable to the public entity.

Given the Ninth Circuit's striking departure from the plain language of *Monell* and its progeny as well as the text of §1983 itself, it is not surprising that it stands alone among the circuits with respect to this issue. The result is a circuit conflict that requires resolution.

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[3] Trial court fees have not yet been sought by plaintiffs.

3. The First, Second, Fourth and Eleventh Circuits recognize that claims for prospective relief are subject to *Monell*.

Not a single circuit has followed the Ninth Circuit in concluding that claims for prospective relief are exempt from *Monell*. Indeed, two circuits have expressly rejected *Chaloux*'s reasoning, and two others, without reference to *Chaloux*, have found that *Monell* compels application of the "custom, policy and practice" standard to claims for prospective relief.

In *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002), the court held that *Monell* governed a claim for prospective relief and rejected the reasoning of *Chaloux*, stating it was "on its face at odds with *Monell* itself." Similarly, in *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007), the Second Circuit acknowledged that *Monell* governed claims for prospective relief, noting that the district court had erroneously relied upon *Chaloux*, given the Ninth Circuit's departure from the clear command of *Monell*:

> To the extent *Chaloux* proposes to exempt all claims for prospective relief from *Monell*'s policy or custom requirement, we are not persuaded by its logic. *Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a

> municipal policy or custom in suits seeking monetary, declaratory, or injunctive relief.

506 F.3d at 191.

Two other circuits, without reference to *Chaloux*, have found that *Monell* governs claims for protective relief. In *Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995), the court expressly held that the plaintiffs were not entitled to injunctive relief under §1983 because they could not establish the existence of a municipal policy. Similarly, in *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994), the court vacated a preliminary injunction, finding that plaintiffs could not establish that the underlying conduct was the result of a custom, practice or policy under *Monell*.

Moreover, other circuits have recognized *Chaloux*'s departure from *Monell*, but found it unnecessary to reach the issue in the cases before them. *See Leary v. Daechner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000) [acknowledging circuit conflict but assuming "without deciding, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages"]; *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) [observing that "the predominate though not unanimous view is that *Monell*'s holding applies regardless of the nature of the relief sought"].

4. The circuit conflict concerns a recurring issue impacting local public entities throughout the country and necessitates review.

The explicit conflict among the federal appellate courts concerning application of *Monell* to claims for prospective relief requires resolution. Claims for prospective relief, particularly declaratory relief, are ubiquitous in suits against local public entities. And, because local public entities are often tasked with enforcing state laws and state mandated procedures, they are inviting, indeed, inevitable targets for suits challenging such laws and procedures – even those which they have no power to alter or ignore. This court has recognized that its jurisdiction is properly invoked where the issue is "important and appears likely to recur in §1983 litigation against municipalities." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988). That is precisely the case here.[4]

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[4] A sampling of district court decisions underscores the prevalence of this issue. *See, e.g., Trevino v. Lassen Mun. Util. Dist.*, No. CIV. S-07-2106 LKK/DAD, 2009 WL 385792, at *11 (E.D. Cal. Feb. 13, 2009) [plaintiff entitled to summary judgment on claims for injunctive relief against public entity because such claims are not subject to *Monell*]; *Coconut Beach Dev. LLC v. Baptiste*, No. 08-00036 SOM/KSC, 2008 WL 1867933, at *4 & *5 (D. Haw. Apr. 28, 2008) [*Chaloux* and *Truth* establish that *Monell* does not apply for claims for prospective relief, and declining to follow out of circuit cases to the contrary]; *City of Oakland v. Abend*, No. C-07-2142 EMC, 2007

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Moreover, as the Ninth Circuit itself has indicated, unless and until this Court directly addresses the issue of whether claims for prospective relief are subject to *Monell*, it will persist in following *Chaloux*. *See, Truth*, 542 F.3d at 644 [declining to reconsider *Chaloux* in light of *Board of the County Commissioners v. Brown*, 520 U.S. 397 and *McMillian v. Monroe County*, 520 U.S. 781 because "[n]either of these cases addresses whether *Monell* applies to actions only seeking prospective relief"]; *see also, Carbella v. Clark County Sch. Dist.*, 141 F.3d 1174 (Table) (9th Cir. 1998), 1998 WL 141182, at *3 (9th Cir. March 27, 1998) [reversing summary judgment on claim for injunctive relief directing reinstatement of plaintiff, noting *Monell* does not apply to claims for prospective relief and declining to depart from

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WL 2023506, at *13 (N.D. Cal. July 12, 2007) [rejecting motion to dismiss for failure to meet *Monell* requirements on claims for prospective relief, noting under *Chaloux* no such requirements apply]; *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 861 (N.D. Cal. 1994) [noting that plaintiff need not satisfy *Monell* requirements to prevail on claims for injunctive relief based on enforcement of state law, but rejecting injunction on other grounds]; *James v. Jones*, 148 F.R.D. 196, 204 n.11 (W.D. Ky. 1993) [citing *Chaloux*, and noting that Sixth Circuit has not addressed issue of *Monell*'s applicability to claims for prospective relief, but absent such authority court will follow *Monell*]; *Platte v. Thomas Twp.*, 504 F. Supp. 2d 227, 240-41 (E.D. Mich. 2007) [noting open question in the Eighth Circuit whether *Monell* applies to claims for prospective relief, but finding it unnecessary to resolve question].

Chaloux in light of *Board of the County Commissioners v. Brown*, 520 U.S. 347, because *Brown* did not address "prospective relief"].

In addition, it is appropriate for this Court to grant review in this case at this time. There is no further proceeding contemplated in the Ninth Circuit with respect to whether the plaintiffs are prevailing parties on the declaratory relief claim. The court has remanded to the Appellate Commissioner solely for the determination of the amount of fees. (App.4.)[5] And, because there is an award of interim fees, they will be paid regardless of what subsequently transpires in the district court with respect to plaintiffs' claims for damages. Indeed, as the Ninth Circuit has emphasized, it perceives those claims, which even it acknowledges are subject to *Monell*, as independent from the claim for declaratory relief upon which the fee award is based. (App.4.) In sum, the issue is clearly presented at this time and is ripe for review by this Court.

The Ninth Circuit's blatant departure from this Court's decision in *Monell* must be corrected, and the

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[5] Petitioner County of Los Angeles cannot await issuance of a subsequent order of the Ninth Circuit setting the amount of fees without risking a determination that a petition for certiorari raising the prevailing party issue would be untimely. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-13 (1952) [period for seeking certiorari runs from initial order resolving issue sought to be reviewed, even if subsequent order repeats prior ruling while resolving other issues].

standards governing municipal liability applied consistently throughout the circuits. For these reasons, the court should grant the petition.

II. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DETERMINATION THAT PLAINTIFFS HAVE PREVAILED ON A CLAIM FOR DECLARATORY RELIEF AGAINST THE COUNTY, ABSENT ANY PROOF OF A CUSTOM, POLICY OR PRACTICE ATTRIBUTABLE TO THE COUNTY UNDER *MONELL*, RUNS AFOUL OF THIS COURT'S DECISIONS IN *HEWITT* AND *RHODES* BARRING PREVAILING PARTY STATUS ABSENT RELIEF THAT AFFECTS THE BEHAVIOR OF THE DEFENDANT TOWARD THE PLAINTIFFS.

Plaintiffs did not move for summary judgment on any of their claims in the district court. Defendants obtained for summary judgment on the ground that the provisions of CANRA and CACI satisfied due process. (App.244-45.) In reversing the district court's grant of summary judgment on this issue, and determining that nothing in CANRA foreclosed the County from adding additional procedures, the court acknowledged that whether the County's failure to provide such procedures was the result of a custom, policy or practice attributable to the County under *Monell* remained an open question. (App.72.) The court, however, did not reverse with directions to

enter judgment on any claim. Rather, it simply stated:

> We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion. (*Id.*)

In granting plaintiffs' motion for attorney's fees, the Ninth Circuit, seizing upon its resolution of the constitutional issue, determined that the Humphries "prevailed on their claim for declaratory relief and are thus entitled to an award of attorney's fees." (App.2.) Without analysis, the court declared that its holding that "the State and County procedures used in maintaining the . . . Index . . . were constitutionally insufficient and thus" that CANRA "'violates the Humphries procedural due process rights,'" therefore 'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff.'" (*Id.*)

As noted, the court further held that since, under *Chaloux, Monell* does not apply to claims for prospective relief, plaintiffs could be prevailing parties for a fee award against the County, even if it is later determined that the County's failure to implement any particular procedures was not the result of a policy, custom or practice attributable to the County. (App.3-4.)

The Ninth Circuit's decision blatantly disregards this Court's decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988),

which foreclose prevailing party status based solely on resolution of a legal issue, without regard to the safeguards accompanying a formal declaratory judgment and meaningful evaluation of whether the relief obtained affects the behavior of the defendant towards the plaintiff.

A. The Ninth Circuit's Order Violates *Hewitt*'s Holding That Mere Resolution Of A Legal Issue Is Not The Equivalent Of A Declaratory Judgment Entered After Consideration Of Equitable Issues, Including Whether In Fact Such A Decree Would Materially Affect The Defendant's Behavior Towards The Plaintiff.

In *Hewitt*, a prisoner sued prison officials for various violations of due process. 482 U.S. at 757. The defendants asserted qualified immunity and also contested the constitutional claims on the merits. *Id.* Before any decision was rendered, the prisoner was released. *Id.* The district court granted summary judgment against the prisoner on the constitutional claims without addressing defendants' claim of qualified immunity. *Id.* at 757-58. The Third Circuit reversed, finding that the prisoner had been denied due process, but remanded for determination of qualified immunity. *Id.* at 758.

On remand, the individual defendants obtained summary judgment based on qualified immunity. *Id.* Plaintiff appealed, and that judgment was affirmed.

Id. at 758-59. He then sought attorney's fees in the district court, arguing that the prior judicial determination that his rights had been violated had led to a change in procedure in the State prison system. *Id.* at 759-60. The district court denied the fee claim, but the Third Circuit reversed, finding that its prior holding that his misconduct conviction was unconstitutional was a form of judicial relief. *Id.* at 760.

This Court reversed, noting that the appellate court had never granted declaratory relief:

> The Court of Appeals treated its 1981 holding that Helms' misconduct conviction was unconstitutional as 'a form of judicial relief' – presumably (since nothing else is even conceivable) a form of declaratory judgment. It was not that. *Helms I* explicitly left it to the District Court 'to determine the appropriateness and availability of the requested relief,' [citation]; the Court of Appeals granted no relief of its own, declaratory or otherwise. *Id.*

This Court held that transforming resolution of a legal issue into the equivalent of a declaratory judgment was incompatible with the requirement that a judgment, even a declaratory judgment, must affect the behavior of the defendant which necessarily required consideration of a defendant's ultimate liability:

> In all civil litigation, the judicial decree is not the end, but the means. At the end of the

> rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

Id. at 761 (emphasis in original).

This Court noted that absent some showing that the purported declaratory relief materially altered the defendants' legal relationship to the plaintiff, it would not suffice for prevailing party status. As the Court observed, such a result would be absurd since, at the end of the day, if defendants truly were not liable for the violation – in that case based on qualified immunity – the declaration was essentially of no effect:

> As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only "relief" he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law

> in an otherwise unfavorable opinion. There would be no conceivable claim that the plaintiff had "'prevailed,'" for instance, if the District Court in this case had first decided the question of immunity, and the Court of Appeals affirmed in a published opinion which said: "'The defendants are immune from suit for damages, and the claim for expungement is either moot or has been waived, but if not for that we would reverse because Helms' constitutional rights were violated.'"

Id. at 761-62.

That is virtually identical to the situation present here. Because the underlying issue of whether the policies in question can even be attributed to the County remains up in the air for purposes of liability, it is impossible to see how a decision in plaintiffs' favor materially affects the relationship between the parties. If these policies are not in fact County policies but mandated by State law, how can the declaration, as a practical matter, impact the County's responsibility to afford relief?

As *Hewitt* noted, there is also a "practical objection to equating statements of law (even legal holdings en route to a final judgment for the defendant) with declaratory judgments. . . ." *Id.* at 762. Such post-facto characterizations of legal holdings as the equivalent of declaratory relief "deprives the defendant of valid defense to a declaratory judgment to which he is entitled." *Id.* As this Court observed:

> Imagine that following *Helms I*, Helms' counsel, armed with the holding that his client's constitutional rights had been violated, pressed the District Court for entry of a declaratory judgment. The defendants would then have had the opportunity to contest its entry not only on the ground that the case was moot but also on equitable grounds. The fact that a court *can* enter a declaratory judgment does not mean that it *should*. [Citations.]

Id. at 762-63 (emphasis in original).

Indeed, this Court noted that in determining whether to afford declaratory relief, a court would appropriately consider whether the defendants would actually be liable on an underlying claims for damages:

> If the only effect of a declaratory judgment in those circumstances would be to provide a possible predicate for a fee award against defendants who may ultimately be found immune, and thus to undermine the doctrine of official immunity, it is conceivable that the court might take that into account in deciding whether to enter a judgment. The same considerations may not enter into the decision whether to include statements of law in opinions – or if they do, the court's decision is not appealable in the same manner as its entry of a declaratory judgment.

Id. at 763.

Once again, that is essentially the situation present here. The Ninth Circuit has identified no meaningful relief obtained by plaintiffs as against the County on the claim for declaratory relief. The only purpose of the post-facto declaratory judgment granted by the Ninth Circuit is as a "possible predicate for a fee award" against the County, despite the fact the County may eventually be found not to be liable for damages under *Monell*. As this Court emphasized in *Hewitt*, a court, in determining whether to grant a declaratory judgment, might well take into account the question of whether such a declaratory judgment would serve as a predicate for a fee award under circumstances that would undermine an underlying rule of liability itself – in this case *Monell* – by imposing liability on local public entities for conduct that is not fairly attributable to them.

The Ninth Circuit has done exactly what this Court in *Hewitt* said it cannot do – transformed resolution of a legal issue into the equivalent of declaratory relief, solely as predicate for a fee claim, without showing how in fact such a declaratory judgment materially affects the County's conduct vis-à-vis the plaintiffs. Worst yet, it does so where, given that the *Monell* issue is open, it appears that in fact plaintiff might never be able to establish that the County itself is responsible for any of the alleged policies.

B. Under *Rhodes*, The Mere Fact That Plaintiffs Asserted A Claim For Declaratory Relief Does Not Transform Determination Of A Legal Issue Into The Equivalent Of A Declaratory Judgment Where Plaintiffs Cannot Establish That The Relief Obtained Materially Affects Their Relationship With Defendant.

Nor does it make any difference that here, unlike *Hewitt*, the plaintiffs pled a claim for declaratory relief in the complaint. The Ninth Circuit's opinion did not purport to direct entry of judgment on that claim or any other claim; rather, the court reversed summary judgment as to the State and County and remanded for proceedings consistent with the opinion. (App.72.) And in any event, as this Court held in *Rhodes v. Stewart*, 488 U.S. 1, 3, the mere fact that "the plaintiff in *Hewitt* had not won a declaratory judgment, nothing in our opinion suggested that the entry of such a judgment in a party's favor automatically renders that party prevailing under §1988." As the Court observed: "Indeed, we confirmed the contrary proposition. . . ." Citing *Hewitt*, this Court emphasized that the ultimate determination of whether an award of declaratory relief confers prevailing party status under §1988 depends on whether it "affects the behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4 (emphasis omitted).

In *Rhodes*, the plaintiffs had filed suit to invalidate restrictions on their receipt of magazine subscriptions as prisoners; however, since one was released and the other had died before the district court entered its order invalidating the prison rule, they could not in fact obtain redress from any changes in prison policy caused by their lawsuit. Hence, despite the fact that plaintiffs had obtained a declaratory judgment, they could not be deemed prevailing parties for purposes of a fee award. *Id.* at 3.

Again, that is the situation here. If, at the end of the day, plaintiffs cannot establish that any policy, custom or practice of the County led to the absence of procedural protections, it cannot be said that plaintiffs have obtained any meaningful relief from the County. In fact, the Ninth Circuit has not explained how the specific declaratory relief it purportedly granted in any way materially impacts plaintiffs' position vis-à-vis the County.

The Ninth Circuit's fee order clearly evinces at best its confusion about, and at worst its disregard of, the guiding principles this Court enunciated in *Hewitt* and *Rhodes* concerning the circumstances in which an award of declaratory relief may give rise to a fee claim under §1988. Thus, for this reason too, review is warranted.

CONCLUSION

For the foregoing reasons, petitioner urges that the petition be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRAIG ARTHUR HUMPHRIES; WENDY DAWN ABORN HUMPHRIES, Plaintiffs-Appellants, v. COUNTY OF LOS ANGELES; LEROY BACA, individually and in his official capacity as Los Angeles County Sheriff; MICHAEL L. WILSON, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; CHARLES T. ANSBERRY, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; BILL LOCKYER, Attorney General, in his official capacity as Attorney General of the State of California, Defendants-Appellees.	No. 05-56467 D.C. No. CV-03-00697-JVS Central District of California, Santa Ana ORDER (Filed Jun. 22, 2009)

Before: BYBEE and M. SMITH, Circuit Judges, and MILLS,* District Judge.

* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Appellants Craig and Wendy Humphries have submitted an application for attorney's fees pursuant to 42 U.S.C. § 1988. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

We find that the Humphries have prevailed on their claim for declaratory relief and are thus entitled to an award of attorney's fees. *See Animal Lovers Volunteer Ass'n Inc. v. Carlucci,* 867 F.2d 1224, 1225 (9th Cir. 1989) (awarding attorney's fees as to declaratory relief despite the lack of a formal order for declaratory judgment). In our January 30, 2009 Opinion, we held that the State and County procedures used in maintaining the Child Abuse Central Index ("the CACI") were constitutionally insufficient, and thus the Child Abuse and Neglect Reporting Act ("CANRA") "violates the Humphries' procedural due process rights." *Humphries v. County of Los Angeles,* 554 F.3d 1170, 1202 (9th Cir. 2009). This holding "materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111-12 (1992). Accordingly, we find that the Humphries have prevailed on their claim for declaratory relief against both the County of Los Angeles ("the County") and Bill Lockyer in his official capacity as Attorney General of the State of California ("the State").

Although the Humphries are entitled to an award of attorney's fees, each defendant is not equally responsible for paying those fees. We have recognized that if the conduct of one of the parties "was the focus of the litigation and required a larger portion of the time of plaintiff's counsel, it is appropriate to allocate the burden of the fee award accordingly." *Sable Commc'ns of Cal., Inc. v. Pac. Tel & Tel. Co.,* 890 F.2d 184, 194 (9th Cir. 1989). Similarly, we have considered "the extent of the defendants' culpability" when dividing fees between defendants. *Id.* (upholding a 75% to 25% split of fees between defendants).

The State – by crafting the statutory and regulatory provisions that created the CACI and its attendant review procedures – shall be responsible for 90% of the fees awarded; the County – by failing to craft its own additional procedural protections – shall be responsible for 10% of the fees awarded. We find that "[i]t is the conduct of the [State] that has been the focus of this litigation" while the County's involvement has been limited to "having granted approval to the [State]" and having failed to implement its own procedures. *Se.* [sic] *Legal Def. Group v. Adams,* 657 F.2d 1118, 1126 (9th Cir. 1981).

The County argues that it cannot be held liable for attorney's fees because we have not decided its liability under *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978). We award attorney's fees here only on the declaratory relief sought in the Humphries' complaint, and it is well established in

our circuit that the limitations to liability established in *Monell* do not apply to claims for prospective relief. *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644 (9th Cir. 2008). However, given that our discussion here only applies to declaratory relief, nothing in this Order shall be construed as a decision on liability under *Monell* in future proceedings.

The determination of an appropriate amount of fees for the successful prosecution of the Humphries' claim for declaratory relief is referred to the court's special master, Appellate Commissioner Peter L. Shaw, who shall conduct whatever proceedings he deems appropriate, and who shall submit a report and recommendation to this panel. *See* 9th Cir. R. 39-1.9. His recommendation should consider that hours for unrelated claims are not subject to an award of attorney's fees unless "they involve a common core of facts or are based on related legal theories." *O'Neal v. City of Seattle*, 66 F.3d 1064, 1069 (9th Cir. 1995) (internal quotation marks omitted).

It is so ORDERED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRAIG ARTHUR HUMPHRIES; WENDY DAWN ABORN HUMPHRIES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LEROY BACA, individually and in his official capacity as Los Angeles County Sheriff; MICHAEL L. WILSON, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; CHARLES T. ANSBERRY, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; BILL LOCKYER, Attorney General, in his official capacity as Attorney General of the State of California,

Defendants-Appellees.

No. 05-56467

D.C. No. CV-03-00697-JVS

SECOND ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
October 19, 2007 – Pasadena, California

Filed November 5, 2008
Amended January 15, 2009
Second Amendment January 30, 2009

Before: Jay S. Bybee and
Milan D. Smith, Jr., Circuit Judges,
and Richard Mills,* District Judge.

Opinion by Judge Bybee

COUNSEL

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Edmund G. Brown Jr., Attorney General of the State of California, David S. Chaney, Chief Assistant Attorney General, James T. Schiavenza, Senior Assistant Attorney General, Marsha S. Miller, Supervising Deputy Attorney General, Paul C. Epstein (argued), Deputy Attorney General, State of California Department of Justice, Office of the Attorney General, Los Angeles, California, for the defendant-appellee.

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* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Carolyn A. Kubitschek, Lansner & Kubitschek, New York, New York, for the amicus National Coalition for Child Protection Reform.

ORDER

The opinion, originally filed November 5, 2008, and amended January 15, 2009, slip op. 563, is amended as follows:

1. At slip op. 619, second full paragraph, lines 24 and 25, delete "we remand to the district court to determine whether or not the County is entitled to qualified immunity." Add the following: "we remand to the district court to determine the County's liability under *Monell*."

OPINION

BYBEE, Circuit Judge:

Appellants Craig and Wendy Humphries are living every parent's nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them "factually innocent" of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as "not true."

Notwithstanding the findings of two California courts that the Humphries were "factually innocent" and the charges "not true," the Humphries were identified as "substantiated" child abusers and placed on California's Child Abuse Central Index ("the CACI"), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This case presents the question of whether California's maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does.

I. FACTS AND PROCEEDINGS

A. *The Statutory Scheme*

1. The Child Abuse and Neglect Reporting Act

California maintains a database of "reports of suspected child abuse and severe neglect," known as the Child Abuse Central Index or CACI. CAL. PENAL CODE § 11170(a)(2). California has collected such

information since 1965, *see* 1965 Cal. Stat. 1171, and since 1988, the maintenance of the CACI has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), CAL. PENAL CODE §§ 11164-11174.

a. Inclusion in the CACI

There are many different ways a person can find themself listed in the CACI. CANRA mandates that various statutorily enumerated individuals report instances of known or suspected child abuse and neglect either to a law enforcement agency or to a child welfare agency. *Id.* § 11165.9. These agencies, in turn, are required to conduct "an active investigation," *id.* § 11169(a), which involves investigating the allegation and determining whether the incident is "substantiated, inconclusive, or unfounded," CAL. CODE REGS. tit. 11, § 901(a) (2008).

In an attempt by the legislature to demonstrate how many negatives it could place in a single provision, CANRA then provides that the agency shall send the California Department of Justice ("CA DOJ") a written report "of every case it investigates of known or suspected child abuse or severe neglect which is determined not to be unfounded," but that the "agency shall not forward a report to the [CA DOJ] unless it has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL CODE § 11169(a). CANRA defines a report as "unfounded" if it is "determined by the investigator who conducted the investigation [1] to be false, [2] to

be inherently improbable, [3] to involve an accidental injury, or [4] not to constitute child abuse or neglect." *Id.* § 11165.12(a). There is no further definition of what it means for a report to be "false" or "inherently improbable," and no discussion of the standard of proof by which that determination is to be made. Presumably, a report is "not unfounded" if the investigator determines that it meets none of these four criteria.

CANRA defines two other categories of reports, those that are "substantiated" and those that are "inconclusive." A "substantiated report" means that "the investigator who conducted the investigation" determined that the report "constitute[d] child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect occurred." *Id.* § 11165.12(b). An "inconclusive report" means that "the investigator who conducted the investigation" found the report "not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . occurred." *Id.* § 11165.12(c). Both inconclusive and substantiated reports are submitted to the CA DOJ for inclusion in the CACI. *See id.* §§ 11169(a), (c), 11170(a)(3).

To summarize, we understand section 11169(a), when read in conjunction with section 11165.12, to require agencies to investigate all reports of child abuse. Each reported incident of child abuse must then be categorized as (1) "substantiated," meaning it is more likely than not that child abuse or neglect

occurred; (2) "inconclusive," meaning there is insufficient evidence to determine whether child abuse and/or neglect occurred; or (3) "unfounded," meaning the report is false, inherently improbable, an accidental injury, or does not constitute child abuse or neglect. It appears that "substantiated" and "inconclusive" reports include everything that is "not unfounded." The agency must submit both "substantiated" and "inconclusive" reports for inclusion in the CACI.

Given the high standard of proof required for a report to be dismissed as "unfounded" – false or inherently improbable – and the low standard of proof required for a report to be categorized as "substantiated" – more likely than not – with "inconclusive" presumably encompassing everything in between, we understand the minimum evidence required for CANRA to compel the submission of a report to be something less than a preponderance, but more than a scintilla. CANRA further requires that the CA DOJ "shall maintain an index of all reports of child abuse and severe neglect submitted pursuant to" the process described above. *Id.* § 11170(a)(1). The CACI is maintained by means of a computerized data bank. *See People v. Bernstein,* 243 Cal. Rptr. 363, 367 (Cal. Ct. App. 1987).

b. Consequences of Inclusion in the CACI

CANRA states that the CA DOJ shall make the information in the CACI available to a broad range of third parties for a variety of purposes. For example, the information in the CACI is made available

> to the State Department of Social Services, or to any county licensing agency that has contracted with the state for the performance of licensing duties . . . concerning any person who is an applicant for licensure or any adult who resides or is employed in the home of an applicant for licensure or who is an applicant for employment in a position having supervisorial or disciplinary power over a child or children, or who will provide 24-hour care for a child or children in a residential home or facility, pursuant to [various statutory sections].

CAL. PENAL CODE § 11170(b)(4). The information is also provided to persons "making inquiries for purposes of pre-employment background investigations for peace officers, child care licensing or employment, adoption, or child placement." CAL. CODE REGS. tit. 11, § 907(b) (2008); *see also* CAL. PENAL CODE § 11170(b)(8). The "Court Appointed Special Advocate program that is conducting a background investigation of an applicant seeking employment with the program or a volunteer position as a Court Appointed Special Advocate" also has access to CACI information. CAL. PENAL CODE § 11170(b)(5).

The scope of CANRA is not limited to California institutions. CANRA makes the CACI information available "to an out-of-state agency, for purposes of approving a prospective foster or adoptive parent or relative caregiver for placement of a child" so long as "the out-of-state statute or interstate compact provision that requires that the information received in response to the inquiry shall be disclosed and used for no purpose other than conducting background checks in foster or adoptive cases." *Id.* § 11170(e)(1). Thus, it appears that if another state's agencies require CACI information for foster or adoptive purposes, the CA DOJ is also obligated to make it available.[1]

> CANRA provides that agencies obtaining the CACI information are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer.

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[1] Although the CACI information can apparently be released under these statutes to administrative agencies, private licensing agencies, private employers, or law enforcement entities, we will generally refer to these groups collectively throughout the opinion as "agencies."

Id. § 11170(b)(9)(A). The same provision also applies to out of state agencies that receive CACI information. *Id.* § 11170(e)(2).

Although CANRA itself only requires that the CA DOJ make this information available, other statutory provisions mandate that certain agencies consult the CACI prior to issuing a variety of state-issued licenses or other benefits. For example, California Health and Safety Code § 1522.1 provides that "[p]rior to granting a license to, or otherwise approving, any individual to care for children, the [State Department of Social Services] shall check the [CACI]." CAL. HEALTH & SAFETY CODE § 1522.1(a); *see id.* § 1502(b). Similarly, in order to work as a volunteer in crisis nurseries, California law mandates that "[v]olunteers shall complete a [CACI] check." *Id.* § 1526.8(b)(2). Also, "[p]rior to granting a license to or otherwise approving any individual to care for children in either a family day care home or a day care center, the [State Department of Social Services] shall check the [CACI]." *Id.* § 1596.877(b).[2]

> California Welfare and Institutions Code § 361.4 similarly requires that [w]henever a child may be placed in the home of a relative, or a prospective guardian or other person

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[2] We also note that, although it does not specifically mandate the agency to reference the CACI, in language similar to CANRA, § 1596.607 of the Health and Safety Code allows DSS to deny a "trustline applicant" if there is evidence of "substantiated child abuse." CAL. HEALTH & SAFETY CODE § 1596.607.

> who is not a licensed or certified foster parent, the county social worker shall cause a check of the [CACI] . . . to be requested from the [CA DOJ]. The [CACI] check shall be conducted on all persons over 18 years of age living in the home.

CAL. WELF. & INST. CODE § 361.4(c). Finally, California has implemented a pilot program through the State Department of Social Services ("DSS") to create a "child-centered resource family approval process" in lieu of existing processes for "licensing foster family homes, approving relatives and nonrelative extended family members as foster care providers, and approving adoptive families." *Id.* § 16519.5(a). The approval standards under this statute include "utilizing a check of the [CACI]." *Id.* § 16519.5(d)(1)(A)(i). Based on these provisions, it is apparent that the CACI listing plays an integral role in obtaining many rights under California law, including employment, licenses, volunteer opportunities, and even child custody. *See also* Alisha M. Santana, *A Pointer System that Points to the Nonexistent: Problems with the Child Abuse Central Index (CACI)*, 4 WHITTIER J. CHILD & FAM. ADVOC. 115, 115-16 (2004) (describing the case of a grandmother denied custody of her grandchildren because DSS discovered two hits on the CACI matching her name).

c. Removal From the CACI

CANRA requires that at the time the agency forwards the report to the CA DOJ for inclusion in

the CACI, "the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the [CACI]." CAL. PENAL CODE § 11169(b). The identified child abuser may obtain the report of suspected child abuse and information contained within their CACI listing. *Id.* § 11167.5(b)(11). Understandably, notified individuals who believe that they have wrongfully been included in the CACI would want to be removed from the CACI as expeditiously as possible. CANRA provides that an individual who was originally listed in the CACI pursuant to an "inconclusive or unsubstantiated report" will be deleted from the CACI after ten years, as long as no subsequent report containing his or her name is received within that time period. *Id.* § 11170(a)(3). There is no provision for removing an individual who was originally listed in the CACI pursuant to a "substantiated report"; such a person apparently remains listed in the CACI permanently. *See id.* § 11170(a)(1).

CANRA offers no procedure for challenging a listing on the CACI. CANRA does provide that "[i]f a report has previously been filed which subsequently proves to be unfounded, [the CA DOJ] shall be notified in writing of that fact and shall not retain the report." *Id.* § 11169(a). The statute does not describe *who* must notify the CA DOJ of that fact, or how the determination that a report has "subsequently prove[d] to be unfounded" is to be made. CANRA also provides that the CACI "shall be continually updated by the department and shall not contain any

reports that are determined to be unfounded." *Id.* § 11170(a)(1). By using the passive voice, CANRA fails to specify who is supposed to determine that a report is unfounded, or how to make that decision in order to remove unfounded reports from the CACI.

Apparently, only the submitting agency can decide if a report has proved unfounded. CANRA provides that "[t]he submitting agencies are responsible for the accuracy, completeness, and retention of the reports," thus suggesting that the submitting agencies are also responsible for removing reports that are determined to be unfounded. *Id.* § 11170(a)(2). Furthermore, as explained above, CANRA defines an "unfounded report" as "a report that is determined *by the investigator who conducted the investigation* to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." *Id.* § 11165.12(a) (emphasis added); *see id.* § 11165.12(b) (a "substantiated report" means "a report that is *determined by the investigator* . . . ") (emphasis added). Whether this definition solely references the initial determination of listing someone on the CACI, or whether it also constitutes the definition for a continuing obligation to remove someone from the CACI is unclear. These provisions suggest, however, that the investigator and agency that conducted the investigation are responsible for making, and thus correcting, the determination that a report is unfounded.

Although CANRA itself provides no procedure for an individual to challenge a CACI listing, nothing

in the statute prevents a submitting agency from enacting some procedure to allow an individual to challenge their listing or seek to have a determination made that a report is "unfounded." *See id.* § 11170(a)(2). CANRA also contemplates that the CA DOJ "may adopt rules governing recordkeeping and reporting," which may allow the CA DOJ to enact some procedure beyond that provided by CANRA. *Id.* § 11170(a)(1). To this point, we are unaware of any regulations that provide additional regulatory procedures for challenging a listing on the CACI or the validity of the underlying report. To the contrary, the CA DOJ explicitly "presumes that the substance of the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency." CAL. CODE REGS. tit. 11, § 904 (2008).

B. *The Humphries' Nightmare*

The Humphries' nightmarish encounter with the CANRA system began on March 17, 2001, when S.H., Craig's fifteen year-old daughter from a previous marriage, took their car and drove to her biological mother's home in Utah. S.H. had previously lived in Utah with her biological mother and stepfather and their three younger children. In June 2000, S.H.'s biological mother called Craig and said she wanted S.H. to live with the Humphries in Valencia, California, on a trial basis. The night of March 17, S.H. took the Humphries' car without their knowledge, drove to her mother's home in Utah, and reported

that the Humphries had been abusing her for several months. An emergency room physician diagnosed "non-accidental trauma, with extremity contusions."

1. The Humphries' Arrest and Inclusion in the CACI

Based on an investigation from the Utah police, the victim's statement, and emergency room records describing the victim's allegations, on April 11, 2001, Michael L. Wilson, a detective for the Family Crimes Bureau of the Los Angeles County Sheriff's Department ("LASD"), obtained probable cause warrants to arrest the Humphries for cruelty to a child, CAL. PENAL CODE § 273a(a), and torture, *id.* § 206. On April 16, Detective Wilson, accompanied by fellow detective Charles Ansberry, arrested Craig and Wendy Humphries, and booked them on the single charge of felony torture under California Penal Code § 206. The same day, a Sheriff's deputy, without a warrant, picked up the Humphries' two other children from their schools and placed them in protective custody.[3] Both children denied any fear of abuse or mistreatment and indicated their desire to return home. Custody of the children was then transferred to the County Department of Children and Family Services, which placed the children in foster care.

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[3] The Humphries have asserted a § 1983 claim regarding the warrantless seizure of the children. That claim is not before us on this appeal.

On April 17, 2001, the day after the Humphries were arrested, Detective Wilson completed a child abuse investigation report identifying the Humphries' case as a "substantiated report" of child abuse.[4] Pursuant to CANRA, this information was sent to the CA DOJ, which in turn created a CACI listing identifying Craig and Wendy Humphries as child abuse suspects with a "substantiated" report.

2. Judicial Proceedings Exonerating the Humphries

a. The Criminal Case

On April 18, 2001, Detective Wilson filed a complaint in the Los Angeles County Superior Court, charging the Humphries with corporal injury to a child, CAL. PENAL CODE § 273d(a), and cruelty to a child by endangering health, *id.* § 273a(b), both misdemeanors.

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[4] At the time that Detective Wilson filed his report, a "substantiated" report of child abuse was defined as one where the investigator found "credible evidence" of abuse. CAL. PENAL CODE § 11165.12(b) (2001). As discussed above, § 11165.12 has since been amended to define a "substantiated" report as one "determined by the investigator who conducted the investigation to constitute child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect . . . occurred." *Id.* § 11165.12(b).

On August 29, 2001, the Humphries' criminal case was dismissed.[5] The prosecutor had learned that in November 2000, Dr. Isaac Benjamin Paz surgically removed a melanoma on S.H.'s shoulder. S.H. had follow-up visits with Dr. Paz in December 2000 and March 2001, periods that corresponded with S.H.'s claims of abuse. On all these occasions, Dr. Paz examined S.H.'s entire body, and saw no sign of abuse. The prosecutor determined that this information "contradict[ed] the basic part of [S.H.'s] testimony that she was injured during the entire time" and agreed that the Humphries criminal case for the misdemeanor charges should be dismissed in furtherance of justice. The felony torture charges on which the Humphries had originally been booked were also dismissed.

The Humphries then successfully petitioned the criminal court under California Penal Code § 851.8

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[5] There is some dispute as to whether the felony charge for which the Humphries were originally booked on April 16 is distinct from the misdemeanor charge filed on April 18. The Humphries contend that the district attorney rejected the attempt to file a felony action against them but allowed the case to be filed for misdemeanor consideration. According to the Humphries it was this misdemeanor complaint that was dismissed on August 29, 2001. Because this case is before us on a motion for summary judgment by the state and county parties, we assume the Humphries' account to be true, and from the record it appears that the Humphries were never indicted on the felony charge. Regardless, the petition to seal and destroy their arrest records indicates that the disposition of the torture charges was a "court dismissal."

for orders finding them "factually innocent" of the felony torture charge,[6] and requiring the arrest records pertaining to that charge be sealed and destroyed.[7] A finding of factual innocence means that

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[6] The Humphries argue that the district court erred in concluding that the finding of "factual innocence" was not admissible as evidence under California law. We disagree. California Penal Code § 851.8(i) clearly states that a finding of factual innocence "shall not be admissible as evidence in any action." CAL. PENAL CODE § 851.8(i). The Humphries contend that § 851.8(i) is qualified by § 851.8(k), which provides that sealed records may be "submitted into evidence" on "a showing of good cause" in a civil action brought by the arrested person against the arresting officers or law enforcement jurisdiction. CAL. PENAL CODE § 851.8(k). Section 851.8(k), however, does not allow the "finding of factual innocence" to be submitted into evidence, but rather the underlying "sealed records."

Nevertheless, neither § 851.8(i) nor § 851.8(k) applies to our use of the factual innocence determination in this opinion. Here, even if the Humphries had never been arrested at all, such that there were no § 851.8 arrest warrants to seal, Detective Wilson could have still filed a "substantiated report" resulting in their listing on the CACI. Our determination as to the constitutionality of CANRA is thus not dependent on the underlying arrest. We therefore discuss the factual innocence finding, not as a matter of evidence, but rather as illustrative of the legal quagmire in which the Humphries find themselves. Under California law, they could petition a court for a "factual innocence" determination, but could not challenge their inclusion on the CACI.

[7] The Humphries argue that the district court erred in disregarding the sealing orders as they relate to the information included in their CACI listing. The district court found that the Humphries' contention that the Appellees were maintaining records in violation of the Sealing Orders was not properly before the court because the claim was not made in the complaint. We find that the allegations contained in paragraphs 5 and 6 of the complaint sufficiently allege the issue by stating

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the court found "that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." CAL. PENAL CODE § 851.8(b).

b. The Juvenile Court Case

On April 17, 2001, in separate, non-criminal proceedings, Detective Wilson requested that Los Angeles County file a juvenile court dependency petition to have the Humphries' two children declared dependent children of the juvenile court based on the fact that their "sibling has been abused or neglected." On April 19, the County filed a dependency petition against the Humphries based on S.H.'s allegations. After a hearing on June 12, the juvenile court ordered that the Humphries retain custody of their children, and dismissed all counts as "not true."[8]

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that "the order . . . requires that plaintiffs' arrest records be sealed and scheduled for future destruction. . . . Nevertheless, defendants still refuse to expunge plaintiffs' CACI records." Insofar as this issue is relevant to future proceedings, the district court may consider the claim.

[8] Under the California Rules of Court, the juvenile court is only authorized to find allegations "true" or "not proved." *See* CAL. CT. R. 1450(f) & (h) (renumbered and amended as 5.684 effective Jan. 1, 2007). The state and county parties argue that the juvenile court's "not true" finding does not mean that the allegations are affirmatively false. Regardless, there is no dispute that the juvenile court wrote that the allegations were "not true." Any argument regarding whether the judge should or should not have done so should have been made at the time of the juvenile court proceedings.

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3. The Humphries Seek Removal from the CACI

As required by CANRA, in May 2001, the Humphries were notified that they were listed in the CACI. The notice informed them that if they believed the report was unfounded, and they desired a review, that they should address their request to Detective Wilson. In May 2002, the Humphries contacted LASD's Family Crimes Bureau through their attorney. They discovered that Detective Wilson no longer worked at the Bureau and there was no available procedure for them to challenge their listing in the CACI. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney that after conducting an investigation, the LASD would not reverse its report labeling the Humphries as "substantiated" child abusers for the purposes of the CACI. Becker indicated that the fact that charges were filed "would indicate to us that some sort of crime did occur" and the fact that the case was dismissed "would not negate the entries" into the CACI.

The Humphries also argue that the district court erred in failing to give collateral estoppel effect to the juvenile court's "not true" determination. The district court stated in a footnote that while the collateral estoppel argument "would appear to have merit, the Court need not address that issue in view of its ruling." If a party provides a reason for addressing the issue in light of this opinion, on remand the district court shall make a more definitive finding of the collateral effect of the juvenile court's judgment.

In October 2003, the CA DOJ asked LASD to complete a confirmation questionnaire regarding the Humphries' CACI listing. The questionnaire was answered by a civilian clerical worker who confirmed that the report was still "substantiated" as of October 31, 2003. Despite the fact that two independent California tribunals had found that the allegations underlying the Humphries' CACI listing were "not true" and that the Humphries are "factually innocent," the CA DOJ continues to list the Humphries in the CACI as substantiated child abusers. Furthermore, because the Humphries were listed pursuant to a "substantiated report," they will remain listed on the CACI indefinitely.

In addition to the harm already dealt to the Humphries' reputation by appearing on a list of actual or suspected child abusers, the Humphries have also alleged that the CACI now places a burden on their ability to pursue some of their normal goals and activities. The Humphries have indicated that they are hesitant to seek these opportunities for fear that the CACI listing will both influence their ability to obtain certain benefits and further injure their already damaged reputation. For example, the Humphries have expressed a desire to work or volunteer at the Florence Crittenton Center in Los Angeles, a community center offering child care and a variety of other services. Bernice Williams, the Human Resources Manager at the center stated, by affidavit, that all adults must undergo a CACI check prior to obtaining clearance to volunteer or teach at

the center. Thus, the Humphries will have to submit to a CACI search before even having an opportunity to volunteer or work at the center.

Similarly, Wendy currently works as a special education teacher and resource specialist at a public school in California. She possesses a number of teaching credentials that must be periodically renewed in order to maintain her current employment – a renewal process that requires her to apply to the California Commission on Teacher Credentialing ("CCTC"). The Humphries have introduced evidence indicating that the information available on the CACI might have an impact on her ability to obtain educational credentials.[9]

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[9] The Humphries introduced as an exhibit a letter by Peter P. Castillo, an attorney for the DSS. The letter states that "[t]he law requires that [the Community Care Licensing Division ("CCLD")] check all child care applicants and employees against the CACI" and goes on to note that CCLD will "share information" with CCTC if requested. In response, the state introduced an affidavit from Castillo reporting that the CCTC "is not one of the agencies authorized by statute to receive [CACI] information" and that his statement in the letter regarding shared information only referred to information that CCLD was permitted to disclose. Based on this exchange and without giving the Humphries an opportunity to respond, the district court found that "it is clear that Wendy cannot and will not be harmed in her pursuit of a teaching credential as a result of being listed on the Index." Viewing the evidence in the light most favorable to the Humphries, Castillo's measured statement did not require the broad conclusion reached by the district court. Thus, insofar as the need arises on remand, the parties are free to introduce additional evidence regarding the obstacles

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Wendy has also indicated a desire to pursue a degree in psychology from the University of California at Los Angeles. Two courses of interest within the psychology department, 134 A/D and 134 B/E, place all of the students in a child care program licensed by the state of California. To enroll in these classes, all potential students must pay for and submit to a CACI check.

4. Procedural History

The Humphries initiated this action in federal district court on August 27, 2002. The Humphries' First Amended Complaint originally included eight counts based on state and federal claims, but on April 14, 2003, the district court dismissed all the state law counts on a Rule 12(b)(6) motion. In the remaining three claims, the Humphries sought relief pursuant to 42 U.S.C. § 1983. They alleged that three actions by California officials deprived them of various rights under the United States Constitution: the Humphries' arrest and incarceration, the Humphries' initial and continued inclusion in CACI, and the seizure and subsequent placement of the Humphries' children in temporary protective custody.

The Humphries sought three types of relief based on these claims. The Humphries demanded damages for the constitutional violations resulting from the

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CACI places on the opportunity for Wendy to pursue her credentials.

government's conduct. In addition to damages, on the allegations related to the Humphries' listing on the CACI, the Humphries sought an injunction ordering the County of Los Angeles to notify the CA DOJ that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD. The Humphries also sought a judicial declaration that CANRA and the County's and State's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records.

Appellees, the County of Los Angeles, Sheriff Leroy D. Baca, and Detectives Wilson and Ansberry ("County Appellees") and California Attorney General Bill Lockyer ("State") (collectively "Appellees"), moved for summary judgment on all claims. The district court denied Appellees' motion for summary judgment on the § 1983 claim regarding the warrantless seizure of the children, but granted Appellees' motion for summary judgment on the § 1983 claim arising out of the Humphries' initial and continued inclusion in the CACI, as well as the § 1983 claim arising out of the Humphries' arrest and incarceration. The Humphries appeal the grant of summary judgment with regard to their claims relating to their inclusion in the CACI, arguing that the Appellees' conduct in listing their names on the CACI and making CACI-related information available to third parties violates their

right to due process under the Fourteenth Amendment.

II. ANALYSIS

To establish a prima facie case under § 1983, the Humphries must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct violated a right secured by the Constitution and laws of the United States. *West v. Atkins,* 487 U.S. 42, 48 (1988). Furthermore, the Supreme Court has insisted that even if there is a qualified immunity issue, we must still consider the threshold question of the "existence or nonexistence of a constitutional right as the first inquiry." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). There is no question that the Humphries' listing on the CACI occurs under color of state law. Thus, the issue in this appeal is whether the initial and continued inclusion of the Humphries on the CACI deprives them of any rights secured by the Constitution and laws of the United States. We find that it does. Accordingly, after our discussion of the existence of a constitutional violation we consider whether the individual and institutional Appellees are entitled to immunity for their acts.

A. *Procedural Due Process*

The Humphries argue that Appellees violated their Fourteenth Amendment right to procedural due process by listing and continuing to list them on the

CACI, without any available process to challenge that listing. In procedural due process claims, the deprivation of a constitutionally protected interest "is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Our analysis proceeds in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460 (1989) (internal citations omitted). The district court found that the Humphries' listing on the CACI did not deprive them of any constitutionally protected liberty or property interest.[10] The court did not reach the second step of the due process analysis.

1. Deprivation of a Protected Liberty Interest

The Humphries contend that they have a liberty interest under the "stigma-plus" test of *Paul v. Davis,* 424 U.S. 693 (1976). The Humphries argue that the stigma of being listed in the CACI as substantiated

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[10] We review a district court's grant of summary judgment *de novo. Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). In conducting such a review, we must ensure that the district court correctly applied the law and that, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain. *Id.*

child abusers, *plus* the various statutory consequences of being listed on the CACI constitutes a liberty interest, of which they may not be deprived without process of law. We agree.[11]

In *Wisconsin v. Constantineau,* the Supreme Court held that a liberty interest may be implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." 400 U.S. 433, 437 (1971). The following year the Court stated that a government

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[11] The Humphries also argue that they have a protected liberty interest created by the mandatory language in CANRA; a protected liberty interest in informational and familial privacy arising under the California Constitution, *see Burt v. County of Orange,* 15 Cal. Rptr. 3d 373, 381-82 (Cal. Ct. App. 2004); a protected liberty interest in familial privacy and autonomy under the federal constitution; and a protected liberty interest created by the sealing orders and California Penal Code § 851.8. Because we hold that the Humphries have been deprived of due process of law, and because it is not evident they would be entitled to any greater process or remedy if they successfully pressed these remaining liberty interests, we will not reach the merits of these arguments. We also decline to reach the Humphries' ill-developed claims to substantive due process based on a right of parents with children to live without unwarranted government interference and the Appellees' conduct relating to the sealing orders. Moreover, it is quite apparent to us that the same qualified immunity analysis would apply to the due process claims regardless of the underlying liberty interest asserted. Nevertheless, if the Humphries believe that these interests require a different due process or qualified immunity analysis than we have ordered here, they are free on remand to raise those claims before the district court and explain why the district court should address them.

employee's liberty interest would be implicated if he were dismissed based on charges that "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). In *Paul v. Davis,* the Supreme Court clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." 424 U.S. 693, 711 (1976). This holding has come to be known as the "stigma-plus test." *See Hart v. Parks,* 450 F.3d 1059, 1070 (9th Cir. 2006).

a. Stigma

As the district court found, being labeled a child abuser by being placed on the CACI is "unquestionably stigmatizing." We have observed that there is "[n]o doubt . . . that being falsely named as a suspected child abuser on an official government index is defamatory." *Miller v. California,* 355 F.3d 1172, 1178 (9th Cir. 2004); *see also Valmonte v. Bane,* 18 F.3d 992, 1000 (2d Cir. 1994) (finding it beyond dispute that inclusion on a child abuse registry damages reputation by "branding" an individual as a child abuser). Indeed, "no conduct so unequivocally violates American ethics as . . . sexual predation upon the most vulnerable members of our society." *Nicanor-Romero v. Mukasey,* 523 F.3d 992, 999 (9th Cir. 2008) (citation omitted). The horror deepens when such

abuse occurs at the hands of the parents, who have an obligation to protect their children. *See id.* at 1013 (Bybee, J., dissenting) ("Our recognition that the victim's vulnerability or intimate relationship with her victimizer can render an act inherently base or vile simply reflects contemporary American mores.").

The Court has identified stigma on the basis of lesser accusations. In *Constantineau,* the chief of police had posted the plaintiff's name on a list that prohibited her from purchasing alcohol pursuant to a state statute forbidding the sale of alcoholic beverages to persons who had become hazardous by reasons of their "excessive drinking." 400 U.S. at 434-35. In *Paul,* the plaintiff's picture appeared on a flyer of individuals who were suspected of shoplifting. 424 U.S. at 695. In both cases the Court found stigma. *Constantineau,* 400 U.S. at 435-37; *Paul,* 424 U.S. at 697, 701 (stating that imputing criminal behavior to an individual is generally considered "defamatory per se" and implicitly finding stigma by holding that stigma alone is insufficient). Being labeled a child abuser is indisputably more stigmatizing than being labeled an excessive drinker or a shoplifter. Indeed, to be accused of child abuse may be our generation's contribution to defamation per se, a kind of moral leprosy.

b. Plus

The more difficult issue is whether the Humphries can satisfy the "plus" test. The Humphries must show

that, as the result of being listed in the CACI, "a right or status previously recognized by state law was distinctly altered or extinguished." *Paul,* 424 U.S. at 711; *see also Siegert v. Gilley,* 500 U.S. 226, 233 (1991) (reaffirming that an injury to reputation by itself is not a protected liberty interest under the Fourteenth Amendment).

As the Court explained in *Paul,* when the chief of police in *Constantineau* posted the plaintiff's name on a list forbidding the sale of alcohol to her, it "significantly altered her status as a matter of state law" by depriving her "of a right previously held under state law [–] the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul,* 424 U.S. at 708. The Court concluded that "it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708-09.

In *Paul* itself, the Louisville Chief of Police placed Davis' name on a flyer distributed to Louisville merchants containing a list of individuals thought to be active in shoplifting. *Id.* at 695. In contrast to the mandatory nature of the statute in *Constantineau,* the flyer merely "came to the attention" of Davis' supervisor who warned him not to repeat his actions in the future. *Id.* at 696. The Court found that this harm to Davis' reputation was not sufficient to create a liberty interest. *Id.* at 712. Notably, no law had required the Chief of Police to distribute this flyer, nor did any law require employers to check the list. Thus, although any impairment to Davis'

employment opportunities "flow[ed] from the flyer in question," his injury only occurred because the flyer happened to have "c[o]me to the attention of [his] supervisor." *Id.* at 696-97.

As a preliminary matter, the Appellees contend that the Humphries' attempt to satisfy the "plus" test is foreclosed by our decision in *Miller v. California*, 355 F.3d 1172 (9th Cir. 2004). In *Miller*, we confronted different questions concerning the rights of grandparents listed on the CACI. The Millers' three grandchildren had been removed from their parents' home, and the Millers were eventually named the children's guardians. *Id.* at 1173-75. In the meantime, as a result of a doctor's concern about possible sexual abuse, Charles Miller's name was listed on the CACI. *Id.* at 1174-75. The Millers brought suit to clear their names and argued that county employees, by placing Charles Miller's name on the CACI, had conspired to deprive them of a liberty interest to associate with their grandchildren. *Id.* at 1173-74. We held that the Millers had no "substantive due process right to family integrity or association as noncustodial grandparents of children who are dependents of the court, nor of a liberty interest in visiting their grandchildren." *Id.* at 1176.

In a separate argument, Charles Miller argued that he had suffered a stigma-plus injury to his reputation and had been denied an opportunity to be heard on the deprivation. *Id.* at 1177. We concluded that Miller had shown injury to his reputation, but could not establish the "plus" because he was "not

legally disabled by the listing [on the CACI] alone from doing anything they otherwise could do." *Id.* at 1179. As we observed, the Millers were in fact awarded guardianship of their grandchildren after Charles' name had been placed on the CACI. The only "plus" alleged in *Miller* was a fundamental liberty interest in preserving family association. *Id.* at 1178. We held that because grandparents have no constitutionally protected liberty interest in a relationship with their grandchildren, the Millers could not allege "plus" on those grounds. *Id.*

Significantly, we expressly declined to address whether the mere presence of Miller's name on the CACI denied him due process "because CANRA provides no procedure by which those suspected of being child abusers can challenge the allegations against them." *Id.* at 1179 n.4. The argument had not been properly presented to the district court and was not properly before us. We also did not address whether requiring agencies to search the CACI prior to issuing a license constitutes a viable "plus." We now take the opportunity to address these issues left open in *Miller.*

The Humphries allege more than mere reputational harm – being listed on the CACI alters their rights in two general ways. First, state statutes mandate that licensing agencies search the CACI and conduct an additional investigation prior to granting a number of rights and benefits. These rights include gaining approval to care for children in a day care center or home, CAL. HEALTH & SAFETY CODE

§ 1596.877(b), obtaining a license or employment in child care, *id.* § 1522.1(a), volunteering in a crisis nursery, *id.* § 1526.8(b)(2), receiving placement or custody of a relative's child, CAL. WELF. & INST. CODE § 361.4(c), or qualifying as a resource family, *id.* § 16519.5(d)(1)(A)(i). These benefits are explicitly conditioned on the agency checking the CACI and conducting an additional investigation. Second, information in the CACI is specifically made available to other identified agencies: state contracted licensing agencies overseeing employment positions dealing with children, CAL. PENAL CODE § 11170(b)(4); persons making pre-employment investigations for "peace officers, child care licensing or employment, adoption, or child placement," *id.* § 11170(b)(8); individuals in the Court Appointed Special Advocate program conducting background investigations for potential Court Appointed Special Advocates, *id.* § 11170(b)(5), and out-of-state agencies making foster care or adoptive decisions, *id.* § 11170(e)(1). Although these agencies are not explicitly required by CANRA to consult the CACI, they may, as a practical matter, be required to do so by their own regulations or practices, as discussed below. Thus, inclusion in the CACI alters the Humphries' legal rights or status in a variety of ways that Californians who are not listed on the CACI are not subject to: applying for custody of a relative's child, becoming guardians or adoptive parents (inside or outside of California), obtaining a license for child care, becoming licensed or employed in a position dealing with children, obtaining employment as a peace-officer, and involvement in adoption

and child placement. We have mentioned, and the district court found, that the Humphries were directly affected in their eligibility to work or volunteer at a local community center. The Humphries also introduced evidence indicating that Wendy was affected in her ability to renew her teaching credentials.

We recognize that being listed on the CACI may not fully extinguish the Humphries' rights or status. Agencies that obtain information from the CACI are responsible for "drawing independent conclusions regarding the quality of the evidence disclosed." *Id.* § 11170(b)(9)(A). Thus, for example, inclusion on the CACI does not necessarily bar the Humphries from obtaining a license for child care, but it does guarantee that the licensing entity will conduct an investigation anew before issuing or denying the license. However, we need not find that an agency will necessarily deny the Humphries a license to satisfy the "plus" test. Outright denial would mean that a listing on the CACI has extinguished the Humphries' legal right or status. Rather, *Paul* provides that stigma-plus applies when a right or status is "altered *or* extinguished." 424 U.S. at 711 (emphasis added).

We hold that where a state statute creates both a stigma and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated. A tangible burden exists in this context where a law effectively requires agencies to check a stigmatizing list and investigate any adverse information prior to

conferring a legal right or benefit. As outlined above, California created the CACI via CANRA and explicitly requires agencies to consult the CACI and perform an independent investigation before granting a number of licenses and benefits. This requirement places a tangible burden on a legal right that satisfies the "plus" test.

We find that a tangible burden also exists where the plaintiff can show that, as a practical matter, the law creates a framework under which agencies reflexively check the stigmatizing listing – whether by internal regulation or custom – prior to conferring a legal right or benefit. CANRA appears to create such a legal framework. CANRA explicitly provides that a variety of agencies will have access to the CACI, and we cannot turn a blind eye to the actions of these other agencies merely because they are not explicitly required by statute to receive CACI information.

The record before us on this latter point is admittedly sparse. Nevertheless, as a practical matter, it is difficult to imagine that an agency charged with protecting California's children – through granting or denying licenses to work in child care, allowing people to engage in adoption or child-placement services, or considering potential Court Appointed Special Advocates – would fail to consult the CACI. There is possibly no information more relevant to determining whether a person should be permitted to have a license to work or care for children than whether that person has abused an innocent child in

the past. As Bernice Williams, the Human Resources Manager at the Florence Crittenton Center in Los Angeles stated in her affidavit, "Before any adult is cleared to teach at our school, to work at our day care center, or to work or volunteer anywhere within our facility, he or she must undergo Livescan screening, including a [CA DOJ CACI] check." We would be surprised to hear anything differently from other agencies or entities responsible for providing for the safety and education of children. Indeed, on top of the need to protect California's youth, hiring or giving a license to someone without checking the CACI could potentially lead to tort liability under California law. *See Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 24-25 (Cal. Ct. App. 2000) ("[I]n California, an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him. [T]he theory of negligent hiring here encompasses the *particular risk of molestation by an employee* with a history of this specific conduct.") (internal citations and quotations omitted). Once an agency consults the CACI and finds adverse information, CANRA requires the agency to conduct an investigation and come to its own conclusion. CAL. PENAL CODE § 11170(b)(9)(A)

Viewing the evidence in the light most favorable to the Humphries, we conclude that California has implemented a system whereby the CACI is reflexively consulted prior to the conferral of legal rights or

benefits under California law, even where the statute does not necessarily require agencies to check the list on its face. The CANRA both stigmatizes the Humphries and creates an impediment to the Humphries' ability to obtain legal rights. The Humphries have asserted the existence of a sufficient liberty interest under the stigma-plus test, of which they may not be deprived without due process of law.

Our holding is consistent with *Paul*. In *Paul*, the Court was concerned that every insult by a police officer might create a due process right and turn the Fourteenth Amendment into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. This concern that "a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee," *id.* at 7105, is not triggered here. Our decision is limited to those "stigma-plus" situations where both the defamatory statement and the tangible burden on a legal right are statutorily created. In *Paul*, individual officers independently chose to distribute a leaflet, and the stigmatizing language in the leaflet just happened to come to the attention of the plaintiff's private supervisor. In contrast, the burdens on the Humphries' abilities to obtain various licenses and other legal rights from the state of California are the result of state statutes creating the CACI, instructing state officers to put certain information on the CACI, and effectively mandating that various entities

consult the CACI. The CACI is not just haphazard, second-hand information that happens to reach the ears of an employer. This case does not resemble the sort of state-court tort case that *Paul* feared.

In reaching this holding, we find the Second Circuit's reasoning in *Valmonte v. Bane* persuasive. 18 F.3d 992 (2d Cir. 1994). In *Valmonte,* the Second Circuit heard a challenge to the New York Central Register of Child Abuse and Maltreatment. Under the New York scheme, the Department of Social Services determined whether an allegation of child abuse was "indicated" or "unfounded." *Id.* at 995. If there was "some credible evidence" supporting a complaint, the report was deemed "indicated" and went into the Central Register; otherwise, it was deemed "unfounded," expunged from the Central Register, and destroyed. *Id.* As in California, state agencies, private businesses, and licensing agencies were required to check whether potential employees or applicants were on the Central Register. *Id.* The agency or business could hire the person only if the employer maintained a written record explaining why the person was suitable for employment or a license. *Id.* at 996. The court found that because agencies and employers would learn of Valmonte's inclusion on the Central Register "by operation of law . . . and . . . likely . . . will choose not to hire her due to her status" the New York scheme "[did] not simply defame Valmonte, it place[d] a tangible burden on her employment prospects." *Id.* at 999, 1001. The Second Circuit explained that "[t]his is not just the intangible

deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state." *Id.* at 1001. *Valmonte* stands for the proposition that to satisfy stigma-plus, a child abuse registry does not need to create a per se bar to employment; it is sufficient that a child abuse registry, by operation of law, creates a "statutory impediment" or a "tangible burden" to being hired. *Id.* at 1001-02. *See also Dupuy v. Samuels,* 397 F.3d 493, 503-04, 509-11 (7th Cir. 2005) (finding that where "child care workers effectively are barred from future employment in the child care field once an indicated finding of child abuse or neglect against them is disclosed to, and used by, licensing agencies" a protected liberty interest is "squarely implicate[d]" under *Paul*).

Appellees argue that the CACI differs from the statute in *Valmonte,* because there is no requirement in California that an agency maintain a written record explaining why the person was suitable for employment or other government right. We disagree. The CACI requires agencies to undergo the same investigation to independently establish eligibility for a government benefit. The mere fact that agencies in California are not required to write anything down does not place any less of a burden on the Humphries' ability to obtain employment, a license, or custody than Valmonte experienced under the New York statute.

We emphasize that an injury that results merely from simple defamation is not a constitutional liberty interest under the "stigma-plus" test. *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991). Employment, licensing, custody, or other legal rights under California law are not refused merely because of the deleterious effect of a bad reputation. By operation of law, California has effectively required agencies to consult the CACI, agencies will have to conduct an additional investigation to determine if the Humphries should be eligible for a government benefit, and those agencies will therefore be more hesitant to issue that benefit. As in *Valmonte*, the Humphries will not lose these benefits based merely on their reputation, these benefits "will be refused . . . simply because [their] inclusion on the list results in an added burden on employers who will therefore be reluctant to hire [them]." 18 F.3d at 1001.

We note that the Eleventh Circuit, in *Smith v. Siegelman*, denied a stigma-plus claim where the plaintiff was designated a child sexual abuser and placed on Alabama's Central Registry on Child Abuse and Neglect. 322 F.3d 1290, 1296-98 (11th Cir. 2003). We think *Smith* rests on a different footing. It appears that Alabama did not mandate that potential employers consult the Registry; rather, "the information on the Registry is made available to an employer or potential employer where the employment involves care or supervision of children." *Id.* at 1297; *see also* ALA. CODE § 26-14-8(d) (providing that the information in the registry "may be made available"

to employers).[12] Accordingly, the Eleventh Circuit held that the Alabama scheme was governed by *Paul* because the plaintiff "was [not] denied any right or status other than his not being branded a child sexual abuser." *Id.* at 1297. As we have explained, the CACI is more than a registry that an employer "may" consult. By law, licensing agencies must consult the CACI, investigate, and use the CACI information in making their licensing decisions, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 1522.1(a), 1526.8(b)(2), 1596.877(b). The CACI is much closer to the New York Central Register than the Alabama Registry. *See Valmonte,* 18 F.3d at 1002 (explaining that "the injury associated with the [New York] Central Register is not simply that it exists, or that the list is available to potential employers" but rather that "employers *must* consult the list.").

In addition, the Eleventh Circuit either did not have evidence of or did not consider the possibility that as a result of the statutory framework other entities were effectively required to consult the registry as a matter of internal rule or custom. To the

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[12] Our understanding is that Alabama did not require employers to consult the Alabama registry, and therefore that *Siegelman* is closer to *Paul* than our case. If Alabama did require employers to consult the Alabama Registry and conduct further investigation, then we respectfully disagree with the Eleventh Circuit's holding that there is no "plus." Such a holding would fail to recognize that in *Paul* the reputational damage occurred inadvertently, and not as the result of a statutory mandate.

extent that the Eleventh Circuit refuses to recognize a liberty interest where the state functionally requires agencies to consult a stigmatizing list prior to conferring a government benefit, we must disagree. A state can alter a legal right or status without using the word "must" – the word "may" in conjunction with a rule or custom of "must" can equally deprive a citizen of a liberty interest giving rise to a procedural due process claim.

Thus, we conclude that the Humphries' legal rights or status have been altered. First, California has explicitly required some agencies to search a stigmatizing listing and conduct an additional investigation before issuing a license or benefit under state law. Second, California has made CACI information available to a variety of other agencies, and the Humphries have introduced evidence that those agencies – especially agencies charged with ensuring the safety and well-being of children – reflexively check the CACI before issuing a government license or benefit. Thus, being listed on the CACI places an added burden on entities wishing to confer legal rights or benefits, makes the chances of receiving a benefit conferred under California law less likely, and practically guarantees that conferral of that benefit will be delayed. Accordingly, we hold that the Humphries have satisfied the first step of the procedural due process analysis: They have a liberty interest in both their good name and using it to obtain a license, secure employment, become guardians, volunteer or work for CASA, or adopt. Listing

the Humphries on the CACI places a tangible burden on their ability to exercise this liberty interest. We proceed to consider whether they have been deprived of this interest without due process of law.

2. Adequacy of the Procedural Safeguards

The Humphries must show that the procedural safeguards of their liberty interest established by the state are constitutionally insufficient to protect their rights. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). California currently provides some minimal safeguards against erroneously listing someone on the CACI. In the first place, a reporting agency must conduct "an active investigation and determine[ ] that the report is not unfounded." CAL. PENAL CODE § 11169(a). Once the agency creates the report and forwards it to the CA DOJ, if a report "subsequently proves to be unfounded" the CA DOJ has a duty to "not retain the report." *Id.* Although this entire process is spelled out in the passive voice, it appears that the agency has the duty to correct its files and thus to decide if they are unfounded. *See id.* § 11170(a)(2) ("The submitting agencies are responsible for the accuracy, completeness, and retention of the reports."). CANRA also provides that the CACI "shall be continually updated by the [CA DOJ] and shall not contain any reports that are determined to be unfounded." CAL. PENAL CODE § 11170(a)(1). Once a report has been made to the CA DOJ and an entry made on the CACI, "the agency shall also notify in writing the known or suspected child abuser that he

or she has been reported to the [CACI]." *Id.* § 11169(b).

A person who believes he has been wrongfully listed on the CACI has two possible remedies under CANRA. First, a listed person might try to get the agency who originally reported the information to the CACI to correct its reports. As noted above, it appears that California agencies have a general duty to maintain accurate records and to advise CA DOJ of any report that subsequently proves unfounded. CAL. PENAL CODE §§ 11169(a), 11170(a)(1). CANRA does not identify how an agency is to ensure that it has accurate records or who is responsible for correcting any errors. The CA DOJ's responsibility is limited to ensuring that the CACI "accurately reflects the report it receives from the submitting agency" – it does not appear to have any duty to ensure the accuracy of the report itself. *Id.* § 11170(a)(2); CAL. CODE REGS. tit. 11, § 904 (2008) (stating that the CA DOJ "presumes that the substance of the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency"). At best, CANRA implies that reports are subject to correction "by the investigator who conducted the investigation." *Id.* § 11165.12. However, California provides no formal mechanism for requesting that an investigator review a report or for appealing an investigator's refusal to revisit a prior report. Thus, for this first avenue of obtaining relief, at best an informal process exists in which the person seeking review must contact the agency

blindly and hope the investigator is responsive. It is not clear what a person seeking review is to do if the investigator has transferred from the agency, retired, or died.

Second, the person may rely on a licensing or employing agency to conduct its own investigation and to "draw[] independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer." *Id.* § 11170(b)(9)(A). Indeed, no particular process is required prior to the agency "drawing independent conclusions." Unless the agency unilaterally undertakes its own detailed investigation, it may only perpetuate any errors contained in the original report, even as it draws its own "independent conclusions." In addition, even if the agency has the time, funding, and resources to determine that the evidence contained in the CACI is erroneous or unfounded, it does not have power to expunge the listing.[13] Thus, in the best case scenario for an innocent person placed on the CACI, the only remedy under this avenue for relief is that the agency might still confer the government benefit after taking

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[13] In most instances, California provides no formal means for reviewing or appealing an agency's independent determination. As we discuss in greater detail below, denial of a right by DSS may be subject to judicial review. CAL. HEALTH & SAFETY CODE § 1526; CAL. FAMILY CODE § 8720.

the time to conduct an added background investigation. The CACI listing, however, remains.

We evaluate the process that California provides persons listed on the CACI under the three part test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews* instructs us to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. *Id.* The procedural due process inquiry is made "case-by-case based on the total circumstances." *California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 711 (9th Cir. 2003). We will consider the private and governmental interests first, followed by a discussion of the risk of error in the procedures established by the state.

a. Private Interest

The Humphries' argument in support of their private interest at stake is essentially coextensive with their argument in support of their liberty interest. From all we have said, the Humphries have an interest in not being stigmatized by having their names included in a child abuse database that places a tangible burden on legal rights, if they have not committed the acts underlying the reports that led to their inclusion. Thus, they have an interest in pursuing employment and adoption, seeking to obtain custody of a relative's children, and securing the

appropriate licenses for working with children without having to be subject to an additional investigation, delays, and possible denial of a benefit under California law due to an incorrect listing on the CACI.

b. Governmental Interest

There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the CACI, is an effective and responsible means for California to secure its interest. *See Santosky v. Kramer,* 455 U.S. 745, 766 (1982); *People v. Stockton Pregnancy Control Med. Clinic,* 249 Cal. Rptr. 762, 772 (Cal. Ct. App. 1988) (finding the goals of detecting and preventing child abuse are a "compelling" government interest). Nevertheless, the operative question is not whether California has a significant interest in maintaining CACI – no one doubts that it does – but rather whether California has a significant interest in having a limited process by which an individual can challenge inclusion on the CACI, and to what extent adding additional processes will interfere with the overarching interest in protecting children from abuse.

We do not question, for example, that California has a significant interest in maintaining even "inconclusive" reports, which are reports that are neither "substantiated" nor "un-founded." *See* CAL. PENAL CODE §§ 11165.12, 11169(a). Such reports that only

hint at abuse, when coupled with other information, can reveal patterns that might not otherwise be detected and can be useful to law enforcement. But it is equally apparent that California can have no interest in maintaining a system of records that contains incorrect or even false information. First, the effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims. To clarify our point through an extreme example, it is obvious that if one hundred percent of the population were erroneously included in the CACI, it would provide no benefit to California in identifying dangerous individuals. Thus, the more false information included in a listing index such as the CACI, the less useful it becomes as an effective tool for protecting children from child abuse. In addition, there is a great human cost in California, as elsewhere, to being falsely accused of being a child abuser. These costs are not only borne by the individuals falsely accused, but by their children and extended families, their neighbors and their employers. Indeed, with the same passion that California condemns the child abuser for his atrocious acts, it has an interest in protecting its citizens against such calumny.

California contends that requiring any process beyond what it currently provides will substantially impair the state's ability to protect children because hearings are time-consuming and drain limited resources, resulting in less efficient delivery of primary

services such as protecting children. It is true, of course, that giving individuals some additional procedure by which they can challenge their listing on CACI will impose administrative and fiscal burdens on California. However, generally these burdens are precisely the sort of administrative costs that we expect our government to shoulder. The state has not provided any evidence that the process required to sort through claims of an erroneous listing in the CACI is any more burdensome than the process due in any other context.

c. Risk of Erroneous Deprivation

The final, and perhaps most important, *Mathews* factor is the risk of erroneous deprivation and the probable value of additional procedural safeguards. As we evaluate this factor, we ask "considering the current process, what is the chance the state will make a mistake?" In this case, we ask, "after examining the process by which persons are listed on the CACI, what is the risk of someone being erroneously listed?" In light of the Humphries' allegations – and keeping in mind that we are reviewing a grant of summary judgment in favor of the state – the answer is "quite likely."

Appellees argue that the current procedures present little risk of erroneous deprivation because an agency may transmit a child abuse report only after it "has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL

CODE § 11169(a). We are not assuaged. A determination that the report is "not unfounded" is a very low threshold. As we explained above, CANRA defines an "unfounded report" as a report that the investigator determines "to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." CAL. PENAL CODE § 11165.12(a). Effectively, a determination that a report is "not unfounded" merely means that the investigator could not affirmatively say that the report is "false." This is the reverse of the presumption of innocence in our criminal justice system: the accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable, or accidental. Incomplete or inadequate investigations must be reported for listing on the CACI.

We have no evidence in the record that indicates exactly how many "false positives" reporting agencies receive. *See Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003); *see also Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008) (noting "[t]he problem of unreliable, induced, and even imagined child testimony"). However, given the high stakes in child abuse cases, presumably an agency investigation and child abuse report can be triggered by as little as an anonymous phone call. It is apparent in such a system there is a real danger of prank and spite calls. California should investigate such reports, and it can – and perhaps should – retain records on any reports it cannot determine to be "unfounded." When it retains all

reports that are "not unfounded," it assumes a substantial risk that some of its reports are false, even if the investigator cannot prove to his own satisfaction that they are "unfounded." We understand the need for investigators who work off of hunches, disparate patterns, and minute clues to maintain files on unsubstantiated reports of child abuse for their own investigative purposes. But when such reports find their way into the CACI, there is a real risk that people, like the Humphries, will have to explain publicly how their names ended up on the state's child abuse database.

The record is devoid of any systematic study of the error rate in the CACI. We do note that in a 2004 self-study of CANRA, a California task force reported on a pilot program in San Diego County, where "DOJ discovered that approximately 50 percent of CACI listings originating from [one agency] should be purged because the supporting documentation was no longer maintained at the local level." *Child Abuse and Neglect Reporting Act Task Force Report* 24 (2004). The task force found that "[if] this percentage held true for the entire State it is possible that half of the 800,000 records which DOJ presently maintains in CACI should be purged." *Id.* We will not infer too much from this limited study, except to remark that it confirms our own observations about the low threshold for putting names on the CACI and the tendency to overinclude. As an initial matter then, we conclude that there is a substantial risk that California will deprive innocent persons of their

"reputation-plus" by maintaining files on them in the CACI.

Any errors introduced at the time information is posted to the CACI arguably can be corrected. As we have noted, once the information is posted, the CA DOJ must notify the known or suspected child abuser that he has been reported to the CACI. CAL. PENAL CODE § 11169(b). At that point, if the person believes he has been reported in error, he has three options. First, he can try to informally persuade the investigator who reported it in the first place. Second, he can wait until an agency or other entity that is required to consult the CACI receives the information and rely on the agency or other entity's "independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions." *Id.* § 11170(b)(9)(A). Third, once an agency makes an adverse decision, some persons have a right to appeal the decision in court. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of an adoption denial).

None of these means for correcting erroneous information in the CACI is well designed to do so. We consider each in turn.

1. *Persuading the investigator.* First, attempting to persuade the investigating officer is not a satisfactory way to correct the records. The Humphries received notice that their names had been referred to the CACI. They were not told what information was

there – although, given their recent experience, they had a pretty good idea – and were told, "If you believe the report is unfounded . . . please address your request to Detective M. Wilson." In other words, the only recourse offered to the Humphries was to try to get the investigator who had made the original determination that their case was "substantiated" to change his mind. Nothing in CANRA instructs Detective Wilson how to deal with the Humphries.[14] He is not required to respond to the Humphries or address their concerns or pleas in any way, he has been given no standard for reevaluating his initial judgment, and no one else other than Detective Wilson is required to respond to the Humphries. If Detective Wilson refuses to reconsider his original evaluation, the Humphries have no statutory recourse elsewhere within the LASD.

The Humphries are in a tough position. They are not the only ones. Under the California scheme, Detective Wilson has been placed in a difficult situation, because he has been asked to revisit his initial judgment. Detective Wilson is, by training and employment, an investigator, not an adjudicator. That is not to say that investigators do not have to make important judgments; they do, but these judgments

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[14] Detective Wilson had actually left the department before the Humphries could petition him to revisit his decision. We refer to Detective Wilson in our analysis here as a surrogate for the investigating officer under the statutory scheme to show the limitations in the process afforded by CANRA.

are subject to review, and Detective Wilson has none of the usual checks and balances to rely on. In the course of a criminal investigation, he may have his work reviewed by a superior within the LASD, or the District Attorney's office may review his judgment to decide whether to file formal charges. However, these reviews are likely to take place before any information is posted to the CACI and would have no effect on any review Wilson would undertake at the Humphries' request.[15] Effectively, Detective Wilson has been tasked with being investigator, prosecutor, judge, and jury with respect to the Humphries' CACI listing. He alone makes the initial judgment to place the Humphries on the CACI, with all of its legal consequences. Moreover, his judgment is apparently unreviewable except by himself. Since CANRA does not provide for formal review of a CACI listing, it also means that there are no standards for an investigator to review his prior decisions. Under such circumstances – where there is no standard, no superior outlet for review, and thus no danger of being overturned – it is unlikely that an investigator will, in effect, reverse himself. Any errors made in the

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[15] This is demonstrated clearly in the Humphries' case. Although the Humphries had been booked on felony torture, the district attorney rejected the attempt to file a felony action against them, and only allowed the case to be filed for misdemeanor consideration. The district attorney then dismissed the remainder of the Humphries' case after learning of Dr. Paz's examinations of S.H.'s entire body with no sign of abuse. Nevertheless, this district attorney "review" of Detective Wilson's judgment had no effect on the Humphries' CACI listing.

initial referral to the CACI are, therefore, likely to be perpetuated through an informal appeal.

The California system asks too much of its investigators in this situation. The Due Process Clause does not impose the separation of powers on the state or local governments. *See Colo. Gen. Assembly v. Salazar,* 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari); *Whalen v. United States,* 445 U.S. 684, 689 n.4 (1980). But the Due Process Clause may demand a separation of functions. *See, e.g., Withrow v. Larkin,* 421 U.S. 35, 47 (1975). The burden on the Humphries is a heavy one:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias of prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. Nevertheless, we think the burden has been met in this case, particularly when we consider the risk of erroneous deprivation in light of the interests of those whose names are placed on the CACI. We do not question the honesty and integrity of officials such as

Detective Wilson. We simply believe that in this context, CANRA asks more of a state or local official than is reasonable.

We wish to be clear: We do not adopt the proposition that "agency members who participate in an investigation are disqualified from adjudicating." *Id.* at 52. Such a proposition is belied by the cases and the "incredible variety of administrative mechanisms in this country." *Id.* Rather, we hold that a single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision. The risk of perpetuating any original error is too great.

2. *Reaching an independent agency conclusion.* Appellees also argue that there is little risk of erroneous deprivation because an agency that has consulted the CACI must base its decision regarding the listed person on its own "independent conclusions." CAL. PENAL CODE § 11170(b)(9)(A). Furthermore, California regulations make it "the responsibility of authorized individuals or entities to obtain and review the underlying investigative report and make their own assessment of the merits of the child abuse report." CAL. CODE REGS. tit. 11, § 902 (2008). The decision maker "shall not act solely upon [CACI] information." *Id.*

First, we note that by the time the decision maker has referenced the CACI and become charged with undertaking an additional investigation, the

individual liberty interest in avoiding stigma and alteration of a legal right has already occurred. Of course, the Due Process Clause does not always require the state to offer process to a person prior to the deprivation of a liberty interest, *see Gilbert v. Homar*, 520 U.S. 924, 930 (1997), but we note for purposes of determining the adequacy of the process offered by Appellees – additional investigation of a CACI listing to determine if a person should receive a government benefit – is the very type of interference with a liberty interest that an innocent person listed on the CACI seeks to avoid.

Second, even if the agency conducts a thorough investigation, nothing the agency decides affects the CACI listing; that is, even if an agency, conducting its own investigation, decides that the claims against a listed person are unfounded, the agency has no power to correct the CACI listing. The person is stuck in CACI-limbo. Thus, the process proffered by Appellees fails to address the stigma of being listed on the CACI and resolve the fact that other agencies will still be forced to consult the CACI to confer other benefits under the law.

Disregarding these limitations temporarily, it is not clear to us that an agency, in reality, can or will regularly engage in the process required to determine that charges against an individual are unfounded. As a practical matter, when a person's name appears on the CACI, the agency must take that fact seriously and presume that the person has committed some kind of child abuse, even if there is no record of

conviction. For example, before issuing a license for child care, we cannot imagine that an agency would issue the license to a person listed on the CACI – if it considers doing so at all – without undertaking an investigation to disprove whatever evidence existed that caused the person to be listed in the first place. To restate it in CANRA's own terms, the agency must satisfy itself that information that was "not unfounded" is "unfounded." The agency must be prepared to contradict the investigating agency.

The older the evidence, or the more involved the allegations, the more expensive it will be for the agency to disprove the allegations. We are not unfamiliar with the budgetary and time constraints that hamper government agencies. An agency with a limited budget, presented with the choice of thoroughly investigating allegations of child abuse so that it can issue a license, or simply denying the license after a cursory investigation so that it can spend its resources elsewhere, can reasonably be expected to choose the latter. We do not mean to imply that California agencies will not behave honestly or forthrightly, but we cannot help but observe that such entities bear a substantial burden, embedded in CANRA, to justify issuing a license to a person listed on the CACI. In sum, any agency – and especially agencies that deal with children – are likely to presume the integrity of the information found on the CACI, assume that individuals listed on the CACI actually abused children, and deny the license rather

than risk awarding, for example, a child care license to a listed individual.

This case illustrates these problems. The Humphries allege that they have been erroneously placed on the CACI. In order to clear their name from this stigma, they must apply for a legal right or benefit of the state and subject themselves to an additional investigation before that right or benefit will be conferred. If Craig or Wendy Humphries sought a license to care for children, the licensing agency would have to obtain and review the Humphries' 2001 "file prepared by the child protective agency which investigated the child abuse report." CAL. HEALTH AND SAFETY CODE § 1522.1(a). That file contains Detective Wilson's conclusion that the Humphries were "substantiated" child abusers. In order to protect the children that the Humphries will deal with, the agency is going to start with the presumption that it must deny the license unless it finds evidence contrary to Detective Wilson's investigation. So far as we can determine, the Humphries' file does not include the result of the dependency proceeding (including the finding of "not true"), or information about the dropped criminal charges (including the finding of "factually innocent"). Faced with the cost and time of investigating seven-year old allegations, there is no reason to assume that any agency would attempt to track down this information on its own. In the Humphries' case, the existence of such court records, if they could get them before the licensing agency, might go a long way to rebutting the

presumption. Other applicants, however, may not be so fortunate as to have faced formal proceedings and had the proceedings resolved so clearly in their favor. In the case of a person who is accused of child abuse, but never formally charged, the agency would have to reinvestigate the underlying allegations, possibly requiring the examination of witnesses in order to satisfy itself that the original charges were erroneous. In the end, the agency may do what Sergeant Becker did when asked to review Detective Wilson's file. He simply relied on the fact that charges were filed as evidence "that some sort of crime did occur" and refused to give any weight to the fact that the charges were dismissed in court.

3. *Seeking court review.* Finally, Appellees argue that some persons adversely affected by decisions resulting from their listing on the CACI may seek redress in the legal system on a case-by-case basis. *See, e.g.,* CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of an adoption denial). The administrative review process offers some check on the system. As we know from our own experience, court review of agency decisions can be a cumbersome process. What is most troubling about the states' argument, however, is that even court review cannot solve the problem. Even if an individual is ultimately successful and obtains, for example, a child-care license, the court's favorable disposition has no apparent impact on the individual's listing on the CACI. Thus, the judicial review

afforded by the statute faces the same problem as the original agency determination: It cannot end the stigma or the tangible burden on government rights that an individual listed on the CACI faces.

Again, the Humphries' experience is instructive. The Humphries have taken advantage of every procedure available to them, including the California courts. They went to the dependency court, which found that the allegations were "not true" and returned their children to them. They went to the prosecutor, who dropped all the charges against them. They went to the criminal court, which declared them "factually innocent" and sealed their arrest records. None of this had any effect on their CACI listing. They will remain on the CACI until the investigating agency submits corrected information to the system. There is no effective procedure for the Humphries to challenge this listing, and no way for them to be removed from the listing. The Humphries have been given no opportunity to be heard on the CACI listing.

In sum, we are not persuaded that California has provided a sufficient process for ensuring that persons like the Humphries do not suffer the stigma of being labeled child abusers plus the loss of significant state benefits, such as child-care licenses or employment. The processes in place in California do not adequately reduce the risk of error. In *Valmonte,* which we previously discussed, the New York Central Register had far more procedural protections than the CACI – including a hotline for addressing erroneous listings, a formal investigation

procedure, and two administrative hearings on expungement – yet the Second Circuit found that there was a high risk of erroneous deprivation. 18 F.3d at 995-97, 1003-04. "The crux of the problem with the procedures," according to the Second Circuit, was that New York's "'some credible evidence' standard results in many individuals being placed on the list who do not belong there." *Id.* at 1004. Again, unlike in California, in New York there *was* a detailed procedure for expungement from the list. *Id.* at 995-97. When the court looked at that procedure, it determined that seventy-five percent of those challenging their inclusion on the list were successful. *Id.* at 1003. This confirmed to the court that the original listing determination was suspect. *Id.* at 1003-04.

Here, we do not have comparable statistical data on the rate of error because California has no expungement procedure. However, California's standard for referring names to the CACI – "not unfounded" – is, if anything, more encompassing than New York's word formula – "some credible evidence." Additionally, as we previously noted, even California has recognized, in its task force report, that it may have a high error rate on the CACI, perhaps as high as fifty percent. *Child Abuse and Neglect Reporting Act Task Force Report* at 24. We acknowledge that this figure is not necessarily statistically significant, and we will not treat it as such; however, it does serve as a general indication that a large percentage of the individuals listed on the CACI might have a legitimate basis for expungement. If we can learn any lesson

from New York's experience, it is that California's CACI has the potential to be overinclusive, and perhaps vastly so. We note that as of 2004, there were an estimated 810,000 suspects on the CACI. *Id.* at 7. We echo the Second Circuit's observation: "[I]t [is] difficult to fathom how such a huge percentage of [Californians] could be included on a list . . . unless there has been a high rate of error in determinations." *Valmonte,* 18 F.3d at 1004. We conclude that there is a substantial risk that individuals will be erroneously listed on the CACI, and that California offers insufficient means for correcting those errors.

d. Balancing

Mathews requires that we consider the risk of error in light of the individuals' interest and the government's interest. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 529 (2004) ("The *Mathews* calculus . . . contemplates a judicious balancing of these concerns. . . ."). In the end, this is not a difficult case. The lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the Humphries' due process rights. Undoubtedly, California has a strong interest in protecting its youngest and most vulnerable residents from abuse, but that interest is not harmed by a system which seeks to clear those falsely accused of child abuse from the state's databases. CANRA creates too great a risk of individuals being

placed on the CACI list who do not belong there, and then remaining on the index indefinitely.

Beyond declaring that California's procedural protections are constitutionally inadequate, we do not propose to spell out here precisely what kind of procedure California must create. The state has a great deal of flexibility in fashioning its procedures, and it should have the full range of options open to it. We do not hold that California must necessarily create some hearing prior to listing individuals on CACI. At the very least, however, California must promptly notify a suspected child abuser that his name is on the CACI and provide "some kind of hearing" by which he can challenge his inclusion. *See Goss v. Lopez,* 419 U.S. 565, 578 (1975); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975) (discussing the various forms that a hearing can take). The opportunity to be heard on the allegations ought to be before someone other than the official who initially investigated the allegation and reported the name for inclusion on the CACI, and the standards for retaining a name on the CACI after it has been challenged ought to be carefully spelled out.

Nothing we have said here infringes on the ability of the police, or other agencies, to conduct a full investigation into allegations of child abuse. The need for such investigations – which, we acknowledge, are intrusive and difficult to conduct – is obvious. Nor does anything we have said undermine the ability of appropriate law enforcement agencies to maintain records on such investigations, even if the

investigations do not result in formal charges or convictions. Again, we understand the need for law enforcement to rely on hunches and to collect bits and pieces of information to establish a history or pattern that may lead to formal charges in future cases. The mere maintenance of such investigatory files apart from the CACI does not raise concerns under the Due Process Clause. What California has done is not just maintain a central investigatory file, but attach legal consequences to the mere listing in such files. Once California effectively required agencies to consult the CACI before issuing licenses, the CACI ceased to be a mere investigatory tool. The fact of listing on the CACI became, in substance, a judgment against those listed.

B. *Qualified Immunity*

Having decided that the Humphries' Due Process rights under the Fourteenth Amendment were violated, we next consider whether the individual defendants are entitled to qualified immunity. Officials who violate constitutional rights under color of law are entitled to qualified immunity unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). Although the district court did not reach the issue of qualified immunity we may do so where it is clear from the record before us. *See Redding v. Safford Unified Sch. Dist. No. 1,* 531 F.3d 1071, 1078, 1087 (9th Cir. 2008) (en banc)

(addressing qualified immunity analysis although the district court had found no constitutional violation).

First, Detective Ansberry is entitled to summary judgment in his favor. We have held that "[l]iability under § 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). The Humphries have not presented any evidence that Ansberry was in any way involved in the decision to list the Humphries in the CACI, or to keep them on the CACI.

Next we grant the motion for summary judgment in favor of Sheriff Baca. Under § 1983, a supervisor is only liable for his own acts. Where the constitutional violations were largely committed by subordinates the supervisor is liable only if he participated in or directed the violations. *Id.* There is no evidence that Sheriff Baca had any direct involvement in the decision to list the Humphries on the CACI, or to keep them on the CACI.

We also have no difficulty finding that Detective Wilson is entitled to qualified immunity. We have held that "an officer who acts in reliance on a duly-enacted statute . . . is ordinarily entitled to qualified immunity" which is lost only if it is "so obviously unconstitutional as to require a reasonable officer to refuse to enforce it." *Grossman v. City of Portland,* 33 F.3d 1200, 1209-10 (9th Cir. 1994). The California system, which denied the Humphries their procedural due process rights was not so obviously unconstitutional as to suggest to Detective Wilson that he

ought not abide by CANRA's provisions and report the Humphries for listing on the CACI. A procedural due process analysis that requires a complicated balancing test is sufficiently unpredictable that it was not unreasonable for Detective Wilson to comply with the duly-enacted CANRA provisions. *See Baker v. Racansky,* 887 F.2d 183, 187 (9th Cir. 1989). Therefore, Detective Wilson is entitled to qualified immunity for any damages resulting from the denial of the Humphries' procedural due process rights, and we grant summary judgment in his favor on that claim.

C. *Monell Liability*

Unlike Detective Wilson, the County is not entitled to qualified immunity for acting in good faith reliance on state law. *See Owen v. City of Independence,* 445 U.S. 622, 638 (1980) (finding that there is no qualified immunity for local government). Rather, the County is subject to liability under *Monell v. Department of Social Services*, if a "policy or custom" of the County deprived the Humphries of their constitutional rights. 436 U.S. 658, 694 (1978). The district court did not address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights.

We have held that "[i]n order to avoid summary judgment a plaintiff need only show that there is a question of fact regarding whether there is a city custom or policy that caused a constitutional deprivation." *Wallis v. Spencer,* 202 F.3d 1126, 1136 (9th

Cir. 2000). CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the Index. Nothing in CANRA, however, prevented the LASD from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. By failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine the County's liability under *Monell*.

III. CONCLUSION

For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion. We affirm the district court's grant of summary judgment to Detectives Wilson and Ansbery and Sheriff Baca on the grounds of qualified immunity.

AFFIRMED in part; REVERSED in part and REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CRAIG ARTHUR HUMPHRIES; WENDY DAWN ABORN HUMPHRIES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LEROY BACA, individually and in his official capacity as Los Angeles County Sheriff; MICHAEL L. WILSON, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; CHARLES T. ANSBERRY, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; BILL LOCKYER, Attorney General, in his official capacity as Attorney General of the State of California,

Defendants-Appellees.

No. 05-56467

D.C. No. CV-03-00697-JVS

ORDER AMENDING OPINION AND ORDER, DENYING APPELLEE COUNTY OF LOS ANGELES' PETITION FOR REHEARING AND REHEARING EN BANC, DENYING APPELLEE BILL LOCKYER'S PETITION FOR REHEARING AND REHEARING EN BANC, GRANTING APPELLANTS' MOTION FOR CLARIFICATION, GRANTING IN PART APPELLANTS' PETITION FOR REHEARING OR RECONSIDERATION AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
October 19, 2007 – Pasadena, California

Filed November 5, 2008
Amended January 15, 2009

Before: Jay S. Bybee and
Milan D. Smith, Jr., Circuit Judges,
and Richard Mills,* District Judge.

Opinion by Judge Bybee

COUNSEL

Esther G. Boynton (argued), Beverly Hills, California, for the plaintiffs-appellants.

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Edmund G. Brown Jr., Attorney General of the State of California, David S. Chaney, Chief Assistant Attorney General, James T. Schiavenza, Senior Assistant Attorney General, Marsha S. Miller, Supervising Deputy Attorney General, Paul C. Epstein (argued), Deputy Attorney General, State of California Department

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* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

of Justice, Office of the Attorney General, Los Angeles, California, for the defendant-appellee.

Carolyn A. Kubitschek, Lansner & Kubitschek, New York, New York, for the amicus National Coalition for Child Protection Reform.

ORDER

The opinion, filed November 5, 2008, slip op. 15041, is amended as follows:

1. At slip op. 15056, first full paragraph, line 20, replace "susbstantiated" with "substantiated."

2. At slip op. 15059 n.8, second full paragraph, line 14 of the footnote, replace "If the parties provide" with "If a party provides."

3. At slip op. 15062, first full paragraph, line 18, replace "County's CACI-related policies" with "County's and State's CACI-related policies."

4. At slip op. 15084 n.15, line 7 of the footnote, replace "district court" with "district attorney"; also replace "affect" with "effect."

5. At slip op. 15086, second full paragraph, line 31 replace "very type of liberty interest" with "very type of interference with a liberty interest."

6. At slip op. 15094, second full paragraph, line 31, delete the following: "By failing to do so, LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County summary judgment on this issue. Add the following:

> By failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to qualified immunity.

7. At slip op. 15095, line 1, replace "judgment to the County" with "judgment to the State and the County"

In addition, the panel's order, filed November 5, 2008, addressing the parties' costs is amended to delete "and fees."

With these amendments, the panel has voted to otherwise deny appellee County of Los Angeles' petition for rehearing. Judge Bybee and Judge Smith have voted to deny the petition for rehearing en banc, and Judge Mills recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellee County of Los Angeles's Petition for Rehearing and Rehearing En Banc is DENIED.

The panel has voted to deny appellee Bill Lockyer's petition for rehearing. Judge Bybee and Judge Smith have voted to deny the petition for rehearing en banc, and Judge Mills recommended

denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellee Bill Lockyer's Petition for Rehearing and Suggestion for Rehearing En Banc is DENIED.

With these amendments, the panel has voted to grant appellant's motion for clarification. Appellant's Motion for Clarification is GRANTED.

With these amendments, the panel has also voted to grant in part appellant's petition for rehearing or reconsideration of the November 5, 2008 order. Appellant's Petition for Rehearing or Reconsideration of the November 5, 2008 Order is GRANTED IN PART.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

BYBEE, Circuit Judge:

Appellants Craig and Wendy Humphries are living every parent's nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them "factually innocent" of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the

juvenile court dismissed all counts of the dependency petition as "not true."

Notwithstanding the findings of two California courts that the Humphries were "factually innocent" and the charges "not true," the Humphries were identified as "substantiated" child abusers and placed on California's Child Abuse Central Index ("the CACI"), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This case presents the question of whether California's maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does.

I. FACTS AND PROCEEDINGS

A. *The Statutory Scheme*

1. The Child Abuse and Neglect Reporting Act

California maintains a database of "reports of suspected child abuse and severe neglect," known as

the Child Abuse Central Index or CACI. CAL. PENAL CODE § 11170(a)(2). California has collected such information since 1965, *see* 1965 Cal. Stat. 1171, and since 1988, the maintenance of the CACI has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), CAL. PENAL CODE §§ 11164-11174.

a. Inclusion in the CACI

There are many different ways a person can find themself listed in the CACI. CANRA mandates that various statutorily enumerated individuals report instances of known or suspected child abuse and neglect either to a law enforcement agency or to a child welfare agency. *Id.* § 11165.9. These agencies, in turn, are required to conduct "an active investigation," *id.* § 11169(a), which involves investigating the allegation and determining whether the incident is "substantiated, inconclusive, or unfounded," CAL. CODE REGS. tit. 11, § 901(a) (2008).

In an attempt by the legislature to demonstrate how many negatives it could place in a single provision, CANRA then provides that the agency shall send the California Department of Justice ("CA DOJ") a written report "of every case it investigates of known or suspected child abuse or severe neglect which is determined not to be unfounded," but that the "agency shall not forward a report to the [CA DOJ] unless it has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL CODE § 11169(a). CANRA defines a report

as "unfounded" if it is "determined by the investigator who conducted the investigation [1] to be false, [2] to be inherently improbable, [3] to involve an accidental injury, or [4] not to constitute child abuse or neglect." *Id.* § 11165.12(a). There is no further definition of what it means for a report to be "false" or "inherently improbable," and no discussion of the standard of proof by which that determination is to be made. Presumably, a report is "not unfounded" if the investigator determines that it meets none of these four criteria.

CANRA defines two other categories of reports, those that are "substantiated" and those that are "inconclusive." A "substantiated report" means that "the investigator who conducted the investigation" determined that the report "constitute[d] child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect occurred." *Id.* § 11165.12(b). An "inconclusive report" means that "the investigator who conducted the investigation" found the report "not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . occurred." *Id.* § 11165.12(c). Both inconclusive and substantiated reports are submitted to the CA DOJ for inclusion in the CACI. *See id.* §§ 11169(a), (c), 11170(a)(3).

To summarize, we understand section 11169(a), when read in conjunction with section 11165.12, to require agencies to investigate all reports of child abuse. Each reported incident of child abuse must

then be categorized as (1) "substantiated," meaning it is more likely than not that child abuse or neglect occurred; (2) "inconclusive," meaning there is insufficient evidence to determine whether child abuse and/or neglect occurred; or (3) "unfounded," meaning the report is false, inherently improbable, an accidental injury, or does not constitute child abuse or neglect. It appears that "substantiated" and "inconclusive" reports include everything that is "not unfounded." The agency must submit both "substantiated" and "inconclusive" reports for inclusion in the CACI.

Given the high standard of proof required for a report to be dismissed as "unfounded" – false or inherently improbable – and the low standard of proof required for a report to be categorized as "substantiated" – more likely than not – with "inconclusive" presumably encompassing everything in between, we understand the minimum evidence required for CANRA to compel the submission of a report to be something less than a preponderance, but more than a scintilla. CANRA further requires that the CA DOJ "shall maintain an index of all reports of child abuse and severe neglect submitted pursuant to" the process described above. *Id.* § 11170(a)(1). The CACI is maintained by means of a computerized data bank. *See People v. Bernstein,* 243 Cal. Rptr. 363, 367 (Cal. Ct. App. 1987).

b. Consequences of Inclusion in the CACI

CANRA states that the CA DOJ shall make the information in the CACI available to a broad range of third parties for a variety of purposes. For example, the information in the CACI is made available

> to the State Department of Social Services, or to any county licensing agency that has contracted with the state for the performance of licensing duties . . . concerning any person who is an applicant for licensure or any adult who resides or is employed in the home of an applicant for licensure or who is an applicant for employment in a position having supervisorial or disciplinary power over a child or children, or who will provide 24-hour care for a child or children in a residential home or facility, pursuant to [various statutory sections].

CAL. PENAL CODE § 11170(b)(4). The information is also provided to persons "making inquiries for purposes of pre-employment background investigations for peace officers, child care licensing or employment, adoption, or child placement." CAL. CODE REGS. tit. 11, § 907(b) (2008); *see also* CAL. PENAL CODE § 11170(b)(8). The "Court Appointed Special Advocate program that is conducting a background investigation of an applicant seeking employment with the program or a volunteer position as a Court Appointed Special Advocate" also has access to CACI information. CAL. PENAL CODE § 11170(b)(5).

The scope of CANRA is not limited to California institutions. CANRA makes the CACI information available "to an out-of-state agency, for purposes of approving a prospective foster or adoptive parent or relative caregiver for placement of a child" so long as "the out-of-state statute or interstate compact provision that requires that the information received in response to the inquiry shall be disclosed and used for no purpose other than conducting background checks in foster or adoptive cases." *Id.* § 11170(e)(1). Thus, it appears that if another state's agencies require CACI information for foster or adoptive purposes, the CA DOJ is also obligated to make it available.[1]

> CANRA provides that agencies obtaining the CACI information are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer.

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[1] Although the CACI information can apparently be released under these statutes to administrative agencies, private licensing agencies, private employers, or law enforcement entities, we will generally refer to these groups collectively throughout the opinion as "agencies."

Id. § 11170(b)(9)(A). The same provision also applies to out of state agencies that receive CACI information. *Id.* § 11170(e)(2).

Although CANRA itself only requires that the CA DOJ make this information available, other statutory provisions mandate that certain agencies consult the CACI prior to issuing a variety of state-issued licenses or other benefits. For example, California Health and Safety Code § 1522.1 provides that "[p]rior to granting a license to, or otherwise approving, any individual to care for children, the [State Department of Social Services] shall check the [CACI]." CAL. HEALTH & SAFETY CODE § 1522.1(a); *see id.* § 1502(b). Similarly, in order to work as a volunteer in crisis nurseries, California law mandates that "[v]olunteers shall complete a [CACI] check." *Id.* § 1526.8(b)(2). Also, "[p]rior to granting a license to or otherwise approving any individual to care for children in either a family day care home or a day care center, the [State Department of Social Services] shall check the [CACI]." *Id.* § 1596.877(b).[2]

> California Welfare and Institutions Code § 361.4 similarly requires that [w]henever a child may be placed in the home of a relative, or a prospective guardian or other person

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[2] We also note that, although it does not specifically mandate the agency to reference the CACI, in language similar to CANRA, § 1596.607 of the Health and Safety Code allows DSS to deny a "trustline applicant" if there is evidence of "substantiated child abuse." CAL. HEALTH & SAFETY CODE § 1596.607.

> who is not a licensed or certified foster parent, the county social worker shall cause a check of the [CACI] . . . to be requested from the [CA DOJ]. The [CACI] check shall be conducted on all persons over 18 years of age living in the home.

CAL. WELF. & INST. CODE § 361.4(c). Finally, California has implemented a pilot program through the State Department of Social Services ("DSS") to create a "child-centered resource family approval process" in lieu of existing processes for "licensing foster family homes, approving relatives and nonrelative extended family members as foster care providers, and approving adoptive families." *Id.* § 16519.5(a). The approval standards under this statute include "utilizing a check of the [CACI]." *Id.* § 16519.5(d)(1)(A)(i). Based on these provisions, it is apparent that the CACI listing plays an integral role in obtaining many rights under California law, including employment, licenses, volunteer opportunities, and even child custody. *See also* Alisha M. Santana, *A Pointer System that Points to the Nonexistent: Problems with the Child Abuse Central Index (CACI)*, 4 WHITTIER J. CHILD & FAM. ADVOC. 115, 115-16 (2004) (describing the case of a grandmother denied custody of her grandchildren because DSS discovered two hits on the CACI matching her name).

c. Removal From the CACI

CANRA requires that at the time the agency forwards the report to the CA DOJ for inclusion in

the CACI, "the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the [CACI]." CAL. PENAL CODE § 11169(b). The identified child abuser may obtain the report of suspected child abuse and information contained within their CACI listing. *Id.* § 11167.5(b)(11). Understandably, notified individuals who believe that they have wrongfully been included in the CACI would want to be removed from the CACI as expeditiously as possible. CANRA provides that an individual who was originally listed in the CACI pursuant to an "inconclusive or unsubstantiated report" will be deleted from the CACI after ten years, as long as no subsequent report containing his or her name is received within that time period. *Id.* § 11170(a)(3). There is no provision for removing an individual who was originally listed in the CACI pursuant to a "substantiated report"; such a person apparently remains listed in the CACI permanently. *See id.* § 11170(a)(1).

CANRA offers no procedure for challenging a listing on the CACI. CANRA does provide that "[i]f a report has previously been filed which subsequently proves to be unfounded, [the CA DOJ] shall be notified in writing of that fact and shall not retain the report." *Id.* § 11169(a). The statute does not describe *who* must notify the CA DOJ of that fact, or how the determination that a report has "subsequently prove[d] to be unfounded" is to be made. CANRA also provides that the CACI "shall be continually updated by the department and shall not contain any

reports that are determined to be unfounded." *Id.* § 11170(a)(1). By using the passive voice, CANRA fails to specify who is supposed to determine that a report is unfounded, or how to make that decision in order to remove unfounded reports from the CACI.

Apparently, only the submitting agency can decide if a report has proved unfounded. CANRA provides that "[t]he submitting agencies are responsible for the accuracy, completeness, and retention of the reports," thus suggesting that the submitting agencies are also responsible for removing reports that are determined to be unfounded. *Id.* § 11170(a)(2). Furthermore, as explained above, CANRA defines an "unfounded report" as "a report that is determined *by the investigator who conducted the investigation* to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." *Id.* § 11165.12(a) (emphasis added); *see id.* § 11165.12(b) (a "substantiated report" means "a report that is *determined by the investigator* . . . ") (emphasis added). Whether this definition solely references the initial determination of listing someone on the CACI, or whether it also constitutes the definition for a continuing obligation to remove someone from the CACI is unclear. These provisions suggest, however, that the investigator and agency that conducted the investigation are responsible for making, and thus correcting, the determination that a report is unfounded.

Although CANRA itself provides no procedure for an individual to challenge a CACI listing, nothing

in the statute prevents a submitting agency from enacting some procedure to allow an individual to challenge their listing or seek to have a determination made that a report is "unfounded." *See id.* § 11170(a)(2). CANRA also contemplates that the CA DOJ "may adopt rules governing recordkeeping and reporting," which may allow the CA DOJ to enact some procedure beyond that provided by CANRA. *Id.* § 11170(a)(1). To this point, we are unaware of any regulations that provide additional regulatory procedures for challenging a listing on the CACI or the validity of the underlying report. To the contrary, the CA DOJ explicitly "presumes that the substance of the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency." CAL. CODE REGS. tit. 11, § 904 (2008).

B. *The Humphries' Nightmare*

The Humphries' nightmarish encounter with the CANRA system began on March 17, 2001, when S.H., Craig's fifteen year-old daughter from a previous marriage, took their car and drove to her biological mother's home in Utah. S.H. had previously lived in Utah with her biological mother and stepfather and their three younger children. In June 2000, S.H.'s biological mother called Craig and said she wanted S.H. to live with the Humphries in Valencia, California, on a trial basis. The night of March 17, S.H. took the Humphries' car without their knowledge, drove to her mother's home in Utah, and reported

that the Humphries had been abusing her for several months. An emergency room physician diagnosed "non-accidental trauma, with extremity contusions."

1. The Humphries' Arrest and Inclusion in the CACI

Based on an investigation from the Utah police, the victim's statement, and emergency room records describing the victim's allegations, on April 11, 2001, Michael L. Wilson, a detective for the Family Crimes Bureau of the Los Angeles County Sheriff's Department ("LASD"), obtained probable cause warrants to arrest the Humphries for cruelty to a child, CAL. PENAL CODE § 273a(a), and torture, *id.* § 206. On April 16, Detective Wilson, accompanied by fellow detective Charles Ansberry, arrested Craig and Wendy Humphries, and booked them on the single charge of felony torture under California Penal Code § 206. The same day, a Sheriff's deputy, without a warrant, picked up the Humphries' two other children from their schools and placed them in protective custody.[3] Both children denied any fear of abuse or mistreatment and indicated their desire to return home. Custody of the children was then transferred to the County Department of Children and Family Services, which placed the children in foster care.

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[3] The Humphries have asserted a § 1983 claim regarding the warrantless seizure of the children. That claim is not before us on this appeal.

On April 17, 2001, the day after the Humphries were arrested, Detective Wilson completed a child abuse investigation report identifying the Humphries' case as a "substantiated report" of child abuse.[4] Pursuant to CANRA, this information was sent to the CA DOJ, which in turn created a CACI listing identifying Craig and Wendy Humphries as child abuse suspects with a "substantiated" report.

2. Judicial Proceedings Exonerating the Humphries

a. The Criminal Case

On April 18, 2001, Detective Wilson filed a complaint in the Los Angeles County Superior Court, charging the Humphries with corporal injury to a child, CAL. PENAL CODE § 273d(a), and cruelty to a child by endangering health, *id.* § 273a(b), both misdemeanors.

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[4] At the time that Detective Wilson filed his report, a "substantiated" report of child abuse was defined as one where the investigator found "credible evidence" of abuse. CAL. PENAL CODE § 11165.12(b) (2001). As discussed above, § 11165.12 has since been amended to define a "substantiated" report as one "determined by the investigator who conducted the investigation to constitute child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect . . . occurred." *Id.* § 11165.12(b).

On August 29, 2001, the Humphries' criminal case was dismissed.[5] The prosecutor had learned that in November 2000, Dr. Isaac Benjamin Paz surgically removed a melanoma on S.H.'s shoulder. S.H. had follow-up visits with Dr. Paz in December 2000 and March 2001, periods that corresponded with S.H.'s claims of abuse. On all these occasions, Dr. Paz examined S.H.'s entire body, and saw no sign of abuse. The prosecutor determined that this information "contradict[ed] the basic part of [S.H.'s] testimony that she was injured during the entire time" and agreed that the Humphries criminal case for the misdemeanor charges should be dismissed in furtherance of justice. The felony torture charges on which the Humphries had originally been booked were also dismissed.

The Humphries then successfully petitioned the criminal court under California Penal Code § 851.8

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[5] There is some dispute as to whether the felony charge for which the Humphries were originally booked on April 16 is distinct from the misdemeanor charge filed on April 18. The Humphries contend that the district attorney rejected the attempt to file a felony action against them but allowed the case to be filed for misdemeanor consideration. According to the Humphries it was this misdemeanor complaint that was dismissed on August 29, 2001. Because this case is before us on a motion for summary judgment by the state and county parties, we assume the Humphries' account to be true, and from the record it appears that the Humphries were never indicted on the felony charge. Regardless, the petition to seal and destroy their arrest records indicates that the disposition of the torture charges was a "court dismissal."

for orders finding them "factually innocent" of the felony torture charge,[6] and requiring the arrest records pertaining to that charge be sealed and destroyed.[7] A finding of factual innocence means that

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[6] The Humphries argue that the district court erred in concluding that the finding of "factual innocence" was not admissible as evidence under California law. We disagree. California Penal Code § 851.8(i) clearly states that a finding of factual innocence "shall not be admissible as evidence in any action." CAL. PENAL CODE § 851.8(i). The Humphries contend that § 851.8(i) is qualified by § 851.8(k), which provides that sealed records may be "submitted into evidence" on "a showing of good cause" in a civil action brought by the arrested person against the arresting officers or law enforcement jurisdiction. CAL. PENAL CODE § 851.8(k). Section 851.8(k), however, does not allow the "finding of factual innocence" to be submitted into evidence, but rather the underlying "sealed records."

Nevertheless, neither § 851.8(i) nor § 851.8(k) applies to our use of the factual innocence determination in this opinion. Here, even if the Humphries had never been arrested at all, such that there were no § 851.8 arrest warrants to seal, Detective Wilson could have still filed a "substantiated report" resulting in their listing on the CACI. Our determination as to the constitutionality of CANRA is thus not dependent on the underlying arrest. We therefore discuss the factual innocence finding, not as a matter of evidence, but rather as illustrative of the legal quagmire in which the Humphries find themselves. Under California law, they could petition a court for a "factual innocence" determination, but could not challenge their inclusion on the CACI.

[7] The Humphries argue that the district court erred in disregarding the sealing orders as they relate to the information included in their CACI listing. The district court found that the Humphries' contention that the Appellees were maintaining records in violation of the Sealing Orders was not properly before the court because the claim was not made in the complaint. We find that the allegations contained in paragraphs 5 and 6 of the complaint sufficiently allege the issue by stating

(Continued on following page)

the court found "that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." CAL. PENAL CODE § 851.8(b).

b. The Juvenile Court Case

On April 17, 2001, in separate, non-criminal proceedings, Detective Wilson requested that Los Angeles County file a juvenile court dependency petition to have the Humphries' two children declared dependent children of the juvenile court based on the fact that their "sibling has been abused or neglected." On April 19, the County filed a dependency petition against the Humphries based on S.H.'s allegations. After a hearing on June 12, the juvenile court ordered that the Humphries retain custody of their children, and dismissed all counts as "not true."[8]

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that "the order . . . requires that plaintiffs' arrest records be sealed and scheduled for future destruction. . . . Nevertheless, defendants still refuse to expunge plaintiffs' CACI records." Insofar as this issue is relevant to future proceedings, the district court may consider the claim.

[8] Under the California Rules of Court, the juvenile court is only authorized to find allegations "true" or "not proved." *See* CAL. CT. R. 1450(f) & (h) (renumbered and amended as 5.684 effective Jan. 1, 2007). The state and county parties argue that the juvenile court's "not true" finding does not mean that the allegations are affirmatively false. Regardless, there is no dispute that the juvenile court wrote that the allegations were "not true." Any argument regarding whether the judge should or should not have done so should have been made at the time of the juvenile court proceedings.

(Continued on following page)

3. The Humphries Seek Removal from the CACI

As required by CANRA, in May 2001, the Humphries were notified that they were listed in the CACI. The notice informed them that if they believed the report was unfounded, and they desired a review, that they should address their request to Detective Wilson. In May 2002, the Humphries contacted LASD's Family Crimes Bureau through their attorney. They discovered that Detective Wilson no longer worked at the Bureau and there was no available procedure for them to challenge their listing in the CACI. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney that after conducting an investigation, the LASD would not reverse its report labeling the Humphries as "substantiated" child abusers for the purposes of the CACI. Becker indicated that the fact that charges were filed "would indicate to us that some sort of crime did occur" and the fact that the case was dismissed "would not negate the entries" into the CACI.

The Humphries also argue that the district court erred in failing to give collateral estoppel effect to the juvenile court's "not true" determination. The district court stated in a footnote that while the collateral estoppel argument "would appear to have merit, the Court need not address that issue in view of its ruling." If a party provides a reason for addressing the issue in light of this opinion, on remand the district court shall make a more definitive finding of the collateral effect of the juvenile court's judgment.

In October 2003, the CA DOJ asked LASD to complete a confirmation questionnaire regarding the Humphries' CACI listing. The questionnaire was answered by a civilian clerical worker who confirmed that the report was still "substantiated" as of October 31, 2003. Despite the fact that two independent California tribunals had found that the allegations underlying the Humphries' CACI listing were "not true" and that the Humphries are "factually innocent," the CA DOJ continues to list the Humphries in the CACI as substantiated child abusers. Furthermore, because the Humphries were listed pursuant to a "substantiated report," they will remain listed on the CACI indefinitely.

In addition to the harm already dealt to the Humphries' reputation by appearing on a list of actual or suspected child abusers, the Humphries have also alleged that the CACI now places a burden on their ability to pursue some of their normal goals and activities. The Humphries have indicated that they are hesitant to seek these opportunities for fear that the CACI listing will both influence their ability to obtain certain benefits and further injure their already damaged reputation. For example, the Humphries have expressed a desire to work or volunteer at the Florence Crittenton Center in Los Angeles, a community center offering child care and a variety of other services. Bernice Williams, the Human Resources Manager at the center stated, by affidavit, that all adults must undergo a CACI check prior to obtaining clearance to volunteer or teach at

the center. Thus, the Humphries will have to submit to a CACI search before even having an opportunity to volunteer or work at the center.

Similarly, Wendy currently works as a special education teacher and resource specialist at a public school in California. She possesses a number of teaching credentials that must be periodically renewed in order to maintain her current employment – a renewal process that requires her to apply to the California Commission on Teacher Credentialing ("CCTC"). The Humphries have introduced evidence indicating that the information available on the CACI might have an impact on her ability to obtain educational credentials.[9]

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[9] The Humphries introduced as an exhibit a letter by Peter P. Castillo, an attorney for the DSS. The letter states that "[t]he law requires that [the Community Care Licensing Division ("CCLD")] check all child care applicants and employees against the CACI" and goes on to note that CCLD will "share information" with CCTC if requested. In response, the state introduced an affidavit from Castillo reporting that the CCTC "is not one of the agencies authorized by statute to receive [CACI] information" and that his statement in the letter regarding shared information only referred to information that CCLD was permitted to disclose. Based on this exchange and without giving the Humphries an opportunity to respond, the district court found that "it is clear that Wendy cannot and will not be harmed in her pursuit of a teaching credential as a result of being listed on the Index." Viewing the evidence in the light most favorable to the Humphries, Castillo's measured statement did not require the broad conclusion reached by the district court. Thus, insofar as the need arises on remand, the parties are free to introduce additional evidence regarding the obstacles

(Continued on following page)

Wendy has also indicated a desire to pursue a degree in psychology from the University of California at Los Angeles. Two courses of interest within the psychology department, 134 A/D and 134 B/E, place all of the students in a child care program licensed by the state of California. To enroll in these classes, all potential students must pay for and submit to a CACI check.

4. Procedural History

The Humphries initiated this action in federal district court on August 27, 2002. The Humphries' First Amended Complaint originally included eight counts based on state and federal claims, but on April 14, 2003, the district court dismissed all the state law counts on a Rule 12(b)(6) motion. In the remaining three claims, the Humphries sought relief pursuant to 42 U.S.C. § 1983. They alleged that three actions by California officials deprived them of various rights under the United States Constitution: the Humphries' arrest and incarceration, the Humphries' initial and continued inclusion in CACI, and the seizure and subsequent placement of the Humphries' children in temporary protective custody.

The Humphries sought three types of relief based on these claims. The Humphries demanded damages for the constitutional violations resulting from the

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CACI places on the opportunity for Wendy to pursue her credentials.

government's conduct. In addition to damages, on the allegations related to the Humphries' listing on the CACI, the Humphries sought an injunction ordering the County of Los Angeles to notify the CA DOJ that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD. The Humphries also sought a judicial declaration that CANRA and the County's and State's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records.

Appellees, the County of Los Angeles, Sheriff Leroy D. Baca, and Detectives Wilson and Ansberry ("County Appellees") and California Attorney General Bill Lockyer ("State") (collectively "Appellees"), moved for summary judgment on all claims. The district court denied Appellees' motion for summary judgment on the § 1983 claim regarding the warrantless seizure of the children, but granted Appellees' motion for summary judgment on the § 1983 claim arising out of the Humphries' initial and continued inclusion in the CACI, as well as the § 1983 claim arising out of the Humphries' arrest and incarceration. The Humphries appeal the grant of summary judgment with regard to their claims relating to their inclusion in the CACI, arguing that the Appellees' conduct in listing their names on the CACI and making CACI-related information available to third parties violates their

right to due process under the Fourteenth Amendment.

II. ANALYSIS

To establish a prima facie case under § 1983, the Humphries must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct violated a right secured by the Constitution and laws of the United States. *West v. Atkins,* 487 U.S. 42, 48 (1988). Furthermore, the Supreme Court has insisted that even if there is a qualified immunity issue, we must still consider the threshold question of the "existence or nonexistence of a constitutional right as the first inquiry." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). There is no question that the Humphries' listing on the CACI occurs under color of state law. Thus, the issue in this appeal is whether the initial and continued inclusion of the Humphries on the CACI deprives them of any rights secured by the Constitution and laws of the United States. We find that it does. Accordingly, after our discussion of the existence of a constitutional violation we consider whether the individual and institutional Appellees are entitled to immunity for their acts.

A. *Procedural Due Process*

The Humphries argue that Appellees violated their Fourteenth Amendment right to procedural due process by listing and continuing to list them on the

CACI, without any available process to challenge that listing. In procedural due process claims, the deprivation of a constitutionally protected interest "is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Our analysis proceeds in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460 (1989) (internal citations omitted). The district court found that the Humphries' listing on the CACI did not deprive them of any constitutionally protected liberty or property interest.[10] The court did not reach the second step of the due process analysis.

1. Deprivation of a Protected Liberty Interest

The Humphries contend that they have a liberty interest under the "stigma-plus" test of *Paul v. Davis,* 424 U.S. 693 (1976). The Humphries argue that the stigma of being listed in the CACI as substantiated

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[10] We review a district court's grant of summary judgment *de novo. Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998). In conducting such a review, we must ensure that the district court correctly applied the law and that, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain. *Id.*

child abusers, *plus* the various statutory consequences of being listed on the CACI constitutes a liberty interest, of which they may not be deprived without process of law. We agree.[11]

In *Wisconsin v. Constantineau,* the Supreme Court held that a liberty interest may be implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." 400 U.S. 433, 437 (1971). The following year the Court stated that a government

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[11] The Humphries also argue that they have a protected liberty interest created by the mandatory language in CANRA; a protected liberty interest in informational and familial privacy arising under the California Constitution, *see Burt v. County of Orange,* 15 Cal. Rptr. 3d 373, 381-82 (Cal. Ct. App. 2004); a protected liberty interest in familial privacy and autonomy under the federal constitution; and a protected liberty interest created by the sealing orders and California Penal Code § 851.8. Because we hold that the Humphries have been deprived of due process of law, and because it is not evident they would be entitled to any greater process or remedy if they successfully pressed these remaining liberty interests, we will not reach the merits of these arguments. We also decline to reach the Humphries' ill-developed claims to substantive due process based on a right of parents with children to live without unwarranted government interference and the Appellees' conduct relating to the sealing orders. Moreover, it is quite apparent to us that the same qualified immunity analysis would apply to the due process claims regardless of the underlying liberty interest asserted. Nevertheless, if the Humphries believe that these interests require a different due process or qualified immunity analysis than we have ordered here, they are free on remand to raise those claims before the district court and explain why the district court should address them.

employee's liberty interest would be implicated if he were dismissed based on charges that "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). In *Paul v. Davis,* the Supreme Court clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." 424 U.S. 693, 711 (1976). This holding has come to be known as the "stigma-plus test." *See Hart v. Parks,* 450 F.3d 1059, 1070 (9th Cir. 2006).

a. Stigma

As the district court found, being labeled a child abuser by being placed on the CACI is "unquestionably stigmatizing." We have observed that there is "[n]o doubt . . . that being falsely named as a suspected child abuser on an official government index is defamatory." *Miller v. California,* 355 F.3d 1172, 1178 (9th Cir. 2004); *see also Valmonte v. Bane,* 18 F.3d 992, 1000 (2d Cir. 1994) (finding it beyond dispute that inclusion on a child abuse registry damages reputation by "branding" an individual as a child abuser). Indeed, "no conduct so unequivocally violates American ethics as . . . sexual predation upon the most vulnerable members of our society." *Nicanor-Romero v. Mukasey,* 523 F.3d 992, 999 (9th Cir. 2008) (citation omitted). The horror deepens when such

abuse occurs at the hands of the parents, who have an obligation to protect their children. *See id.* at 1013 (Bybee, J., dissenting) ("Our recognition that the victim's vulnerability or intimate relationship with her victimizer can render an act inherently base or vile simply reflects contemporary American mores.").

The Court has identified stigma on the basis of lesser accusations. In *Constantineau,* the chief of police had posted the plaintiff's name on a list that prohibited her from purchasing alcohol pursuant to a state statute forbidding the sale of alcoholic beverages to persons who had become hazardous by reasons of their "excessive drinking." 400 U.S. at 434-35. In *Paul,* the plaintiff's picture appeared on a flyer of individuals who were suspected of shoplifting. 424 U.S. at 695. In both cases the Court found stigma. *Constantineau,* 400 U.S. at 435-37; *Paul,* 424 U.S. at 697, 701 (stating that imputing criminal behavior to an individual is generally considered "defamatory per se" and implicitly finding stigma by holding that stigma alone is insufficient). Being labeled a child abuser is indisputably more stigmatizing than being labeled an excessive drinker or a shoplifter. Indeed, to be accused of child abuse may be our generation's contribution to defamation per se, a kind of moral leprosy.

b. Plus

The more difficult issue is whether the Humphries can satisfy the "plus" test. The Humphries must show

that, as the result of being listed in the CACI, "a right or status previously recognized by state law was distinctly altered or extinguished." *Paul,* 424 U.S. at 711; *see also Siegert v. Gilley,* 500 U.S. 226, 233 (1991) (reaffirming that an injury to reputation by itself is not a protected liberty interest under the Fourteenth Amendment).

As the Court explained in *Paul,* when the chief of police in *Constantineau* posted the plaintiff's name on a list forbidding the sale of alcohol to her, it "significantly altered her status as a matter of state law" by depriving her "of a right previously held under state law [–] the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul,* 424 U.S. at 708. The Court concluded that "it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708-09.

In *Paul* itself, the Louisville Chief of Police placed Davis' name on a flyer distributed to Louisville merchants containing a list of individuals thought to be active in shoplifting. *Id.* at 695. In contrast to the mandatory nature of the statute in *Constantineau,* the flyer merely "came to the attention" of Davis' supervisor who warned him not to repeat his actions in the future. *Id.* at 696. The Court found that this harm to Davis' reputation was not sufficient to create a liberty interest. *Id.* at 712. Notably, no law had required the Chief of Police to distribute this flyer, nor did any law require employers to check the list. Thus, although any impairment to Davis'

employment opportunities "flow[ed] from the flyer in question," his injury only occurred because the flyer happened to have "c[o]me to the attention of [his] supervisor." *Id.* at 696-97.

As a preliminary matter, the Appellees contend that the Humphries' attempt to satisfy the "plus" test is foreclosed by our decision in *Miller v. California*, 355 F.3d 1172 (9th Cir. 2004). In *Miller*, we confronted different questions concerning the rights of grandparents listed on the CACI. The Millers' three grandchildren had been removed from their parents' home, and the Millers were eventually named the children's guardians. *Id.* at 1173-75. In the meantime, as a result of a doctor's concern about possible sexual abuse, Charles Miller's name was listed on the CACI. *Id.* at 1174-75. The Millers brought suit to clear their names and argued that county employees, by placing Charles Miller's name on the CACI, had conspired to deprive them of a liberty interest to associate with their grandchildren. *Id.* at 1173-74. We held that the Millers had no "substantive due process right to family integrity or association as noncustodial grandparents of children who are dependents of the court, nor of a liberty interest in visiting their grandchildren." *Id.* at 1176.

In a separate argument, Charles Miller argued that he had suffered a stigma-plus injury to his reputation and had been denied an opportunity to be heard on the deprivation. *Id.* at 1177. We concluded that Miller had shown injury to his reputation, but could not establish the "plus" because he was "not

legally disabled by the listing [on the CACI] alone from doing anything they otherwise could do." *Id.* at 1179. As we observed, the Millers were in fact awarded guardianship of their grandchildren after Charles' name had been placed on the CACI. The only "plus" alleged in *Miller* was a fundamental liberty interest in preserving family association. *Id.* at 1178. We held that because grandparents have no constitutionally protected liberty interest in a relationship with their grandchildren, the Millers could not allege "plus" on those grounds. *Id.*

Significantly, we expressly declined to address whether the mere presence of Miller's name on the CACI denied him due process "because CANRA provides no procedure by which those suspected of being child abusers can challenge the allegations against them." *Id.* at 1179 n.4. The argument had not been properly presented to the district court and was not properly before us. We also did not address whether requiring agencies to search the CACI prior to issuing a license constitutes a viable "plus." We now take the opportunity to address these issues left open in *Miller*.

The Humphries allege more than mere reputational harm – being listed on the CACI alters their rights in two general ways. First, state statutes mandate that licensing agencies search the CACI and conduct an additional investigation prior to granting a number of rights and benefits. These rights include gaining approval to care for children in a day care center or home, CAL. HEALTH & SAFETY CODE

§ 1596.877(b), obtaining a license or employment in child care, *id.* § 1522.1(a), volunteering in a crisis nursery, *id.* § 1526.8(b)(2), receiving placement or custody of a relative's child, CAL. WELF. & INST. CODE § 361.4(c), or qualifying as a resource family, *id.* § 16519.5(d)(1)(A)(i). These benefits are explicitly conditioned on the agency checking the CACI and conducting an additional investigation. Second, information in the CACI is specifically made available to other identified agencies: state contracted licensing agencies overseeing employment positions dealing with children, CAL. PENAL CODE § 11170(b)(4); persons making pre-employment investigations for "peace officers, child care licensing or employment, adoption, or child placement," *id.* § 11170(b)(8); individuals in the Court Appointed Special Advocate program conducting background investigations for potential Court Appointed Special Advocates, *id.* § 11170(b)(5), and out-of-state agencies making foster care or adoptive decisions, *id.* § 11170(e)(1). Although these agencies are not explicitly required by CANRA to consult the CACI, they may, as a practical matter, be required to do so by their own regulations or practices, as discussed below. Thus, inclusion in the CACI alters the Humphries' legal rights or status in a variety of ways that Californians who are not listed on the CACI are not subject to: applying for custody of a relative's child, becoming guardians or adoptive parents (inside or outside of California), obtaining a license for child care, becoming licensed or employed in a position dealing with children, obtaining employment as a peace-officer, and involvement in adoption

and child placement. We have mentioned, and the district court found, that the Humphries were directly affected in their eligibility to work or volunteer at a local community center. The Humphries also introduced evidence indicating that Wendy was affected in her ability to renew her teaching credentials.

We recognize that being listed on the CACI may not fully extinguish the Humphries' rights or status. Agencies that obtain information from the CACI are responsible for "drawing independent conclusions regarding the quality of the evidence disclosed." *Id.* § 11170(b)(9)(A). Thus, for example, inclusion on the CACI does not necessarily bar the Humphries from obtaining a license for child care, but it does guarantee that the licensing entity will conduct an investigation anew before issuing or denying the license. However, we need not find that an agency will necessarily deny the Humphries a license to satisfy the "plus" test. Outright denial would mean that a listing on the CACI has extinguished the Humphries' legal right or status. Rather, *Paul* provides that stigma-plus applies when a right or status is "altered *or* extinguished." 424 U.S. at 711(emphasis added).

We hold that where a state statute creates both a stigma and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated. A tangible burden exists in this context where a law effectively requires agencies to check a stigmatizing list and investigate any adverse information prior to

conferring a legal right or benefit. As outlined above, California created the CACI via CANRA and explicitly requires agencies to consult the CACI and perform an independent investigation before granting a number of licenses and benefits. This requirement places a tangible burden on a legal right that satisfies the "plus" test.

We find that a tangible burden also exists where the plaintiff can show that, as a practical matter, the law creates a framework under which agencies reflexively check the stigmatizing listing – whether by internal regulation or custom – prior to conferring a legal right or benefit. CANRA appears to create such a legal framework. CANRA explicitly provides that a variety of agencies will have access to the CACI, and we cannot turn a blind eye to the actions of these other agencies merely because they are not explicitly required by statute to receive CACI information.

The record before us on this latter point is admittedly sparse. Nevertheless, as a practical matter, it is difficult to imagine that an agency charged with protecting California's children – through granting or denying licenses to work in child care, allowing people to engage in adoption or child-placement services, or considering potential Court Appointed Special Advocates – would fail to consult the CACI. There is possibly no information more relevant to determining whether a person should be permitted to have a license to work or care for children than whether that person has abused an innocent child in

the past. As Bernice Williams, the Human Resources Manager at the Florence Crittenton Center in Los Angeles stated in her affidavit, "Before any adult is cleared to teach at our school, to work at our day care center, or to work or volunteer anywhere within our facility, he or she must undergo Livescan screening, including a [CA DOJ CACI] check." We would be surprised to hear anything differently from other agencies or entities responsible for providing for the safety and education of children. Indeed, on top of the need to protect California's youth, hiring or giving a license to someone without checking the CACI could potentially lead to tort liability under California law. *See Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 24-25 (Cal. Ct. App. 2000) ("[I]n California, an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him. [T]he theory of negligent hiring here encompasses the *particular risk of molestation by an employee* with a history of this specific conduct.") (internal citations and quotations omitted). Once an agency consults the CACI and finds adverse information, CANRA requires the agency to conduct an investigation and come to its own conclusion. CAL. PENAL CODE § 11170(b)(9)(A)

Viewing the evidence in the light most favorable to the Humphries, we conclude that California has implemented a system whereby the CACI is reflexively consulted prior to the conferral of legal rights or

benefits under California law, even where the statute does not necessarily require agencies to check the list on its face. The CANRA both stigmatizes the Humphries and creates an impediment to the Humphries' ability to obtain legal rights. The Humphries have asserted the existence of a sufficient liberty interest under the stigma-plus test, of which they may not be deprived without due process of law.

Our holding is consistent with *Paul.* In *Paul,* the Court was concerned that every insult by a police officer might create a due process right and turn the Fourteenth Amendment into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. This concern that "a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee," *id.* at 7105, is not triggered here. Our decision is limited to those "stigma-plus" situations where both the defamatory statement and the tangible burden on a legal right are statutorily created. In *Paul,* individual officers independently chose to distribute a leaflet, and the stigmatizing language in the leaflet just happened to come to the attention of the plaintiff's private supervisor. In contrast, the burdens on the Humphries' abilities to obtain various licenses and other legal rights from the state of California are the result of state statutes creating the CACI, instructing state officers to put certain information on the CACI, and effectively mandating that various entities

consult the CACI. The CACI is not just haphazard, second-hand information that happens to reach the ears of an employer. This case does not resemble the sort of state-court tort case that *Paul* feared.

In reaching this holding, we find the Second Circuit's reasoning in *Valmonte v. Bane* persuasive. 18 F.3d 992 (2d Cir. 1994). In *Valmonte,* the Second Circuit heard a challenge to the New York Central Register of Child Abuse and Maltreatment. Under the New York scheme, the Department of Social Services determined whether an allegation of child abuse was "indicated" or "unfounded." *Id.* at 995. If there was "some credible evidence" supporting a complaint, the report was deemed "indicated" and went into the Central Register; otherwise, it was deemed "unfounded," expunged from the Central Register, and destroyed. *Id.* As in California, state agencies, private businesses, and licensing agencies were required to check whether potential employees or applicants were on the Central Register. *Id.* The agency or business could hire the person only if the employer maintained a written record explaining why the person was suitable for employment or a license. *Id.* at 996. The court found that because agencies and employers would learn of Valmonte's inclusion on the Central Register "by operation of law . . . and . . . likely . . . will choose not to hire her due to her status" the New York scheme "[did] not simply defame Valmonte, it place[d] a tangible burden on her employment prospects." *Id.* at 999, 1001. The Second Circuit explained that "[t]his is not just the intangible

deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state." *Id.* at 1001. *Valmonte* stands for the proposition that to satisfy stigma-plus, a child abuse registry does not need to create a per se bar to employment; it is sufficient that a child abuse registry, by operation of law, creates a "statutory impediment" or a "tangible burden" to being hired. *Id.* at 1001-02. *See also Dupuy v. Samuels,* 397 F.3d 493, 503-04, 509-11 (7th Cir. 2005) (finding that where "child care workers effectively are barred from future employment in the child care field once an indicated finding of child abuse or neglect against them is disclosed to, and used by, licensing agencies" a protected liberty interest is "squarely implicate[d]" under *Paul*).

Appellees argue that the CACI differs from the statute in *Valmonte,* because there is no requirement in California that an agency maintain a written record explaining why the person was suitable for employment or other government right. We disagree. The CACI requires agencies to undergo the same investigation to independently establish eligibility for a government benefit. The mere fact that agencies in California are not required to write anything down does not place any less of a burden on the Humphries' ability to obtain employment, a license, or custody than Valmonte experienced under the New York statute.

We emphasize that an injury that results merely from simple defamation is not a constitutional liberty interest under the "stigma-plus" test. *Siegert v. Gilley,* 500 U.S. 226, 233-34 (1991). Employment, licensing, custody, or other legal rights under California law are not refused merely because of the deleterious effect of a bad reputation. By operation of law, California has effectively required agencies to consult the CACI, agencies will have to conduct an additional investigation to determine if the Humphries should be eligible for a government benefit, and those agencies will therefore be more hesitant to issue that benefit. As in *Valmonte,* the Humphries will not lose these benefits based merely on their reputation, these benefits "will be refused . . . simply because [their] inclusion on the list results in an added burden on employers who will therefore be reluctant to hire [them]." 18 F.3d at 1001.

We note that the Eleventh Circuit, in *Smith v. Siegelman*, denied a stigma-plus claim where the plaintiff was designated a child sexual abuser and placed on Alabama's Central Registry on Child Abuse and Neglect. 322 F.3d 1290, 1296-98 (11th Cir. 2003). We think *Smith* rests on a different footing. It appears that Alabama did not mandate that potential employers consult the Registry; rather, "the information on the Registry is made available to an employer or potential employer where the employment involves care or supervision of children." *Id.* at 1297; *see also* ALA. CODE § 26-14-8(d) (providing that the information in the registry "may be made available"

to employers).[12] Accordingly, the Eleventh Circuit held that the Alabama scheme was governed by *Paul* because the plaintiff "was [not] denied any right or status other than his not being branded a child sexual abuser." *Id.* at 1297. As we have explained, the CACI is more than a registry that an employer "may" consult. By law, licensing agencies must consult the CACI, investigate, and use the CACI information in making their licensing decisions, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 1522.1(a), 1526.8(b)(2), 1596.877(b). The CACI is much closer to the New York Central Register than the Alabama Registry. *See Valmonte,* 18 F.3d at 1002 (explaining that "the injury associated with the [New York] Central Register is not simply that it exists, or that the list is available to potential employers" but rather that "employers *must* consult the list.").

In addition, the Eleventh Circuit either did not have evidence of or did not consider the possibility that as a result of the statutory framework other entities were effectively required to consult the registry as a matter of internal rule or custom. To the

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[12] Our understanding is that Alabama did not require employers to consult the Alabama registry, and therefore that *Siegelman* is closer to *Paul* than our case. If Alabama did require employers to consult the Alabama Registry and conduct further investigation, then we respectfully disagree with the Eleventh Circuit's holding that there is no "plus." Such a holding would fail to recognize that in *Paul* the reputational damage occurred inadvertently, and not as the result of a statutory mandate.

extent that the Eleventh Circuit refuses to recognize a liberty interest where the state functionally requires agencies to consult a stigmatizing list prior to conferring a government benefit, we must disagree. A state can alter a legal right or status without using the word "must" – the word "may" in conjunction with a rule or custom of "must" can equally deprive a citizen of a liberty interest giving rise to a procedural due process claim.

Thus, we conclude that the Humphries' legal rights or status have been altered. First, California has explicitly required some agencies to search a stigmatizing listing and conduct an additional investigation before issuing a license or benefit under state law. Second, California has made CACI information available to a variety of other agencies, and the Humphries have introduced evidence that those agencies – especially agencies charged with ensuring the safety and well-being of children – reflexively check the CACI before issuing a government license or benefit. Thus, being listed on the CACI places an added burden on entities wishing to confer legal rights or benefits, makes the chances of receiving a benefit conferred under California law less likely, and practically guarantees that conferral of that benefit will be delayed. Accordingly, we hold that the Humphries have satisfied the first step of the procedural due process analysis: They have a liberty interest in both their good name and using it to obtain a license, secure employment, become guardians, volunteer or work for CASA, or adopt. Listing

the Humphries on the CACI places a tangible burden on their ability to exercise this liberty interest. We proceed to consider whether they have been deprived of this interest without due process of law.

2. Adequacy of the Procedural Safeguards

The Humphries must show that the procedural safeguards of their liberty interest established by the state are constitutionally insufficient to protect their rights. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). California currently provides some minimal safeguards against erroneously listing someone on the CACI. In the first place, a reporting agency must conduct "an active investigation and determine[] that the report is not unfounded." CAL. PENAL CODE § 11169(a). Once the agency creates the report and forwards it to the CA DOJ, if a report "subsequently proves to be unfounded" the CA DOJ has a duty to "not retain the report." *Id.* Although this entire process is spelled out in the passive voice, it appears that the agency has the duty to correct its files and thus to decide if they are unfounded. *See id.* § 11170(a)(2) ("The submitting agencies are responsible for the accuracy, completeness, and retention of the reports."). CANRA also provides that the CACI "shall be continually updated by the [CA DOJ] and shall not contain any reports that are determined to be unfounded." CAL. PENAL CODE § 11170(a)(1). Once a report has been made to the CA DOJ and an entry made on the CACI, "the agency shall also notify in writing the known or suspected child abuser that he

or she has been reported to the [CACI]." *Id.* § 11169(b).

A person who believes he has been wrongfully listed on the CACI has two possible remedies under CANRA. First, a listed person might try to get the agency who originally reported the information to the CACI to correct its reports. As noted above, it appears that California agencies have a general duty to maintain accurate records and to advise CA DOJ of any report that subsequently proves unfounded. CAL. PENAL CODE §§ 11169(a), 11170(a)(1). CANRA does not identify how an agency is to ensure that it has accurate records or who is responsible for correcting any errors. The CA DOJ's responsibility is limited to ensuring that the CACI "accurately reflects the report it receives from the submitting agency" – it does not appear to have any duty to ensure the accuracy of the report itself. *Id.* § 11170(a)(2); CAL. CODE REGS. tit. 11, § 904 (2008) (stating that the CA DOJ "presumes that the substance of the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency"). At best, CANRA implies that reports are subject to correction "by the investigator who conducted the investigation." *Id.* § 11165.12. However, California provides no formal mechanism for requesting that an investigator review a report or for appealing an investigator's refusal to revisit a prior report. Thus, for this first avenue of obtaining relief, at best an informal process exists in which the person seeking review must contact the agency

blindly and hope the investigator is responsive. It is not clear what a person seeking review is to do if the investigator has transferred from the agency, retired, or died.

Second, the person may rely on a licensing or employing agency to conduct its own investigation and to "draw[] independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer." *Id.* § 11170(b)(9)(A). Indeed, no particular process is required prior to the agency "drawing independent conclusions." Unless the agency unilaterally undertakes its own detailed investigation, it may only perpetuate any errors contained in the original report, even as it draws its own "independent conclusions." In addition, even if the agency has the time, funding, and resources to determine that the evidence contained in the CACI is erroneous or unfounded, it does not have power to expunge the listing.[13] Thus, in the best case scenario for an innocent person placed on the CACI, the only remedy under this avenue for relief is that the agency might still confer the government benefit after taking

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[13] In most instances, California provides no formal means for reviewing or appealing an agency's independent determination. As we discuss in greater detail below, denial of a right by DSS may be subject to judicial review. CAL. HEALTH & SAFETY CODE § 1526; CAL. FAMILY CODE § 8720.

the time to conduct an added background investigation. The CACI listing, however, remains.

We evaluate the process that California provides persons listed on the CACI under the three part test set out in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). *Mathews* instructs us to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. *Id.* The procedural due process inquiry is made "case-by-case based on the total circumstances." *California ex rel. Lockyer v. F.E.R.C.,* 329 F.3d 700, 711 (9th Cir. 2003). We will consider the private and governmental interests first, followed by a discussion of the risk of error in the procedures established by the state.

a. Private Interest

The Humphries' argument in support of their private interest at stake is essentially coextensive with their argument in support of their liberty interest. From all we have said, the Humphries have an interest in not being stigmatized by having their names included in a child abuse database that places a tangible burden on legal rights, if they have not committed the acts underlying the reports that led to their inclusion. Thus, they have an interest in pursuing employment and adoption, seeking to obtain custody of a relative's children, and securing the

appropriate licenses for working with children without having to be subject to an additional investigation, delays, and possible denial of a benefit under California law due to an incorrect listing on the CACI.

b. Governmental Interest

There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the CACI, is an effective and responsible means for California to secure its interest. *See Santosky v. Kramer,* 455 U.S. 745, 766 (1982); *People v. Stockton Pregnancy Control Med. Clinic,* 249 Cal. Rptr. 762, 772 (Cal. Ct. App. 1988) (finding the goals of detecting and preventing child abuse are a "compelling" government interest). Nevertheless, the operative question is not whether California has a significant interest in maintaining CACI – no one doubts that it does – but rather whether California has a significant interest in having a limited process by which an individual can challenge inclusion on the CACI, and to what extent adding additional processes will interfere with the overarching interest in protecting children from abuse.

We do not question, for example, that California has a significant interest in maintaining even "inconclusive" reports, which are reports that are neither "substantiated" nor "unfounded." *See* CAL. PENAL CODE §§ 11165.12, 11169(a). Such reports that only

hint at abuse, when coupled with other information, can reveal patterns that might not otherwise be detected and can be useful to law enforcement. But it is equally apparent that California can have no interest in maintaining a system of records that contains incorrect or even false information. First, the effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims. To clarify our point through an extreme example, it is obvious that if one hundred percent of the population were erroneously included in the CACI, it would provide no benefit to California in identifying dangerous individuals. Thus, the more false information included in a listing index such as the CACI, the less useful it becomes as an effective tool for protecting children from child abuse. In addition, there is a great human cost in California, as elsewhere, to being falsely accused of being a child abuser. These costs are not only borne by the individuals falsely accused, but by their children and extended families, their neighbors and their employers. Indeed, with the same passion that California condemns the child abuser for his atrocious acts, it has an interest in protecting its citizens against such calumny.

California contends that requiring any process beyond what it currently provides will substantially impair the state's ability to protect children because hearings are time-consuming and drain limited resources, resulting in less efficient delivery of primary

services such as protecting children. It is true, of course, that giving individuals some additional procedure by which they can challenge their listing on CACI will impose administrative and fiscal burdens on California. However, generally these burdens are precisely the sort of administrative costs that we expect our government to shoulder. The state has not provided any evidence that the process required to sort through claims of an erroneous listing in the CACI is any more burdensome than the process due in any other context.

c. Risk of Erroneous Deprivation

The final, and perhaps most important, *Mathews* factor is the risk of erroneous deprivation and the probable value of additional procedural safeguards. As we evaluate this factor, we ask "considering the current process, what is the chance the state will make a mistake?" In this case, we ask, "after examining the process by which persons are listed on the CACI, what is the risk of someone being erroneously listed?" In light of the Humphries' allegations – and keeping in mind that we are reviewing a grant of summary judgment in favor of the state – the answer is "quite likely."

Appellees argue that the current procedures present little risk of erroneous deprivation because an agency may transmit a child abuse report only after it "has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL

CODE § 11169(a). We are not assuaged. A determination that the report is "not unfounded" is a very low threshold. As we explained above, CANRA defines an "unfounded report" as a report that the investigator determines "to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." CAL. PENAL CODE § 11165.12(a). Effectively, a determination that a report is "not unfounded" merely means that the investigator could not affirmatively say that the report is "false." This is the reverse of the presumption of innocence in our criminal justice system: the accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable, or accidental. Incomplete or inadequate investigations must be reported for listing on the CACI.

We have no evidence in the record that indicates exactly how many "false positives" reporting agencies receive. *See Broam v. Bogan,* 320 F.3d 1023, 1032 (9th Cir. 2003); *see also Kennedy v. Louisiana,* 128 S. Ct. 2641, 2663 (2008) (noting "[t]he problem of unreliable, induced, and even imagined child testimony"). However, given the high stakes in child abuse cases, presumably an agency investigation and child abuse report can be triggered by as little as an anonymous phone call. It is apparent in such a system there is a real danger of prank and spite calls. California should investigate such reports, and it can – and perhaps should – retain records on any reports it cannot determine to be "unfounded." When it retains all

reports that are "not unfounded," it assumes a substantial risk that some of its reports are false, even if the investigator cannot prove to his own satisfaction that they are "unfounded." We understand the need for investigators who work off of hunches, disparate patterns, and minute clues to maintain files on unsubstantiated reports of child abuse for their own investigative purposes. But when such reports find their way into the CACI, there is a real risk that people, like the Humphries, will have to explain publicly how their names ended up on the state's child abuse database.

The record is devoid of any systematic study of the error rate in the CACI. We do note that in a 2004 self-study of CANRA, a California task force reported on a pilot program in San Diego County, where "DOJ discovered that approximately 50 percent of CACI listings originating from [one agency] should be purged because the supporting documentation was no longer maintained at the local level." *Child Abuse and Neglect Reporting Act Task Force Report* 24 (2004). The task force found that "[if] this percentage held true for the entire State it is possible that half of the 800,000 records which DOJ presently maintains in CACI should be purged." *Id.* We will not infer too much from this limited study, except to remark that it confirms our own observations about the low threshold for putting names on the CACI and the tendency to overinclude. As an initial matter then, we conclude that there is a substantial risk that California will deprive innocent persons of their

"reputation-plus" by maintaining files on them in the CACI.

Any errors introduced at the time information is posted to the CACI arguably can be corrected. As we have noted, once the information is posted, the CA DOJ must notify the known or suspected child abuser that he has been reported to the CACI. CAL. PENAL CODE § 11169(b). At that point, if the person believes he has been reported in error, he has three options. First, he can try to informally persuade the investigator who reported it in the first place. Second, he can wait until an agency or other entity that is required to consult the CACI receives the information and rely on the agency or other entity's "independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions." *Id.* § 11170(b)(9)(A). Third, once an agency makes an adverse decision, some persons have a right to appeal the decision in court. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of an adoption denial).

None of these means for correcting erroneous information in the CACI is well designed to do so. We consider each in turn.

1. *Persuading the investigator.* First, attempting to persuade the investigating officer is not a satisfactory way to correct the records. The Humphries received notice that their names had been referred to the CACI. They were not told what information was

there – although, given their recent experience, they had a pretty good idea – and were told, "If you believe the report is unfounded . . . please address your request to Detective M. Wilson." In other words, the only recourse offered to the Humphries was to try to get the investigator who had made the original determination that their case was "substantiated" to change his mind. Nothing in CANRA instructs Detective Wilson how to deal with the Humphries.[14] He is not required to respond to the Humphries or address their concerns or pleas in any way, he has been given no standard for reevaluating his initial judgment, and no one else other than Detective Wilson is required to respond to the Humphries. If Detective Wilson refuses to reconsider his original evaluation, the Humphries have no statutory recourse elsewhere within the LASD.

The Humphries are in a tough position. They are not the only ones. Under the California scheme, Detective Wilson has been placed in a difficult situation, because he has been asked to revisit his initial judgment. Detective Wilson is, by training and employment, an investigator, not an adjudicator. That is not to say that investigators do not have to make important judgments; they do, but these judgments

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[14] Detective Wilson had actually left the department before the Humphries could petition him to revisit his decision. We refer to Detective Wilson in our analysis here as a surrogate for the investigating officer under the statutory scheme to show the limitations in the process afforded by CANRA.

are subject to review, and Detective Wilson has none of the usual checks and balances to rely on. In the course of a criminal investigation, he may have his work reviewed by a superior within the LASD, or the District Attorney's office may review his judgment to decide whether to file formal charges. However, these reviews are likely to take place before any information is posted to the CACI and would have no effect on any review Wilson would undertake at the Humphries' request.[15] Effectively, Detective Wilson has been tasked with being investigator, prosecutor, judge, and jury with respect to the Humphries' CACI listing. He alone makes the initial judgment to place the Humphries on the CACI, with all of its legal consequences. Moreover, his judgment is apparently unreviewable except by himself. Since CANRA does not provide for formal review of a CACI listing, it also means that there are no standards for an investigator to review his prior decisions. Under such circumstances – where there is no standard, no superior outlet for review, and thus no danger of being overturned – it is unlikely that an investigator will, in effect, reverse himself. Any errors made in the

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[15] This is demonstrated clearly in the Humphries' case. Although the Humphries had been booked on felony torture, the district attorney rejected the attempt to file a felony action against them, and only allowed the case to be filed for misdemeanor consideration. The district attorney then dismissed the remainder of the Humphries' case after learning of Dr. Paz's examinations of S.H.'s entire body with no sign of abuse. Nevertheless, this district attorney "review" of Detective Wilson's judgment had no effect on the Humphries' CACI listing.

initial referral to the CACI are, therefore, likely to be perpetuated through an informal appeal.

The California system asks too much of its investigators in this situation. The Due Process Clause does not impose the separation of powers on the state or local governments. *See Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari); *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). But the Due Process Clause may demand a separation of functions. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The burden on the Humphries is a heavy one:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias of prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. Nevertheless, we think the burden has been met in this case, particularly when we consider the risk of erroneous deprivation in light of the interests of those whose names are placed on the CACI. We do not question the honesty and integrity of officials such as

Detective Wilson. We simply believe that in this context, CANRA asks more of a state or local official than is reasonable.

We wish to be clear: We do not adopt the proposition that "agency members who participate in an investigation are disqualified from adjudicating." *Id.* at 52. Such a proposition is belied by the cases and the "incredible variety of administrative mechanisms in this country." *Id.* Rather, we hold that a single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision. The risk of perpetuating any original error is too great.

2. *Reaching an independent agency conclusion.* Appellees also argue that there is little risk of erroneous deprivation because an agency that has consulted the CACI must base its decision regarding the listed person on its own "independent conclusions." CAL. PENAL CODE § 11170(b)(9)(A). Furthermore, California regulations make it "the responsibility of authorized individuals or entities to obtain and review the underlying investigative report and make their own assessment of the merits of the child abuse report." CAL. CODE REGS. tit. 11, § 902 (2008). The decision maker "shall not act solely upon [CACI] information." *Id.*

First, we note that by the time the decision maker has referenced the CACI and become charged with undertaking an additional investigation, the

individual liberty interest in avoiding stigma and alteration of a legal right has already occurred. Of course, the Due Process Clause does not always require the state to offer process to a person prior to the deprivation of a liberty interest, *see Gilbert v. Homar*, 520 U.S. 924, 930 (1997), but we note for purposes of determining the adequacy of the process offered by Appellees – additional investigation of a CACI listing to determine if a person should receive a government benefit – is the very type of interference with a liberty interest that an innocent person listed on the CACI seeks to avoid.

Second, even if the agency conducts a thorough investigation, nothing the agency decides affects the CACI listing; that is, even if an agency, conducting its own investigation, decides that the claims against a listed person are unfounded, the agency has no power to correct the CACI listing. The person is stuck in CACI-limbo. Thus, the process proffered by Appellees fails to address the stigma of being listed on the CACI and resolve the fact that other agencies will still be forced to consult the CACI to confer other benefits under the law.

Disregarding these limitations temporarily, it is not clear to us that an agency, in reality, can or will regularly engage in the process required to determine that charges against an individual are unfounded. As a practical matter, when a person's name appears on the CACI, the agency must take that fact seriously and presume that the person has committed some kind of child abuse, even if there is no record of

conviction. For example, before issuing a license for child care, we cannot imagine that an agency would issue the license to a person listed on the CACI – if it considers doing so at all – without undertaking an investigation to disprove whatever evidence existed that caused the person to be listed in the first place. To restate it in CANRA's own terms, the agency must satisfy itself that information that was "not unfounded" is "unfounded." The agency must be prepared to contradict the investigating agency.

The older the evidence, or the more involved the allegations, the more expensive it will be for the agency to disprove the allegations. We are not unfamiliar with the budgetary and time constraints that hamper government agencies. An agency with a limited budget, presented with the choice of thoroughly investigating allegations of child abuse so that it can issue a license, or simply denying the license after a cursory investigation so that it can spend its resources elsewhere, can reasonably be expected to choose the latter. We do not mean to imply that California agencies will not behave honestly or forthrightly, but we cannot help but observe that such entities bear a substantial burden, embedded in CANRA, to justify issuing a license to a person listed on the CACI. In sum, any agency – and especially agencies that deal with children – are likely to presume the integrity of the information found on the CACI, assume that individuals listed on the CACI actually abused children, and deny the license rather

than risk awarding, for example, a child care license to a listed individual.

This case illustrates these problems. The Humphries allege that they have been erroneously placed on the CACI. In order to clear their name from this stigma, they must apply for a legal right or benefit of the state and subject themselves to an additional investigation before that right or benefit will be conferred. If Craig or Wendy Humphries sought a license to care for children, the licensing agency would have to obtain and review the Humphries' 2001 "file prepared by the child protective agency which investigated the child abuse report." CAL. HEALTH AND SAFETY CODE § 1522.1(a). That file contains Detective Wilson's conclusion that the Humphries were "substantiated" child abusers. In order to protect the children that the Humphries will deal with, the agency is going to start with the presumption that it must deny the license unless it finds evidence contrary to Detective Wilson's investigation. So far as we can determine, the Humphries' file does not include the result of the dependency proceeding (including the finding of "not true"), or information about the dropped criminal charges (including the finding of "factually innocent"). Faced with the cost and time of investigating seven-year old allegations, there is no reason to assume that any agency would attempt to track down this information on its own. In the Humphries' case, the existence of such court records, if they could get them before the licensing agency, might go a long way to rebutting the

presumption. Other applicants, however, may not be so fortunate as to have faced formal proceedings and had the proceedings resolved so clearly in their favor. In the case of a person who is accused of child abuse, but never formally charged, the agency would have to reinvestigate the underlying allegations, possibly requiring the examination of witnesses in order to satisfy itself that the original charges were erroneous. In the end, the agency may do what Sergeant Becker did when asked to review Detective Wilson's file. He simply relied on the fact that charges were filed as evidence "that some sort of crime did occur" and refused to give any weight to the fact that the charges were dismissed in court.

3. *Seeking court review.* Finally, Appellees argue that some persons adversely affected by decisions resulting from their listing on the CACI may seek redress in the legal system on a case-by-case basis. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of an adoption denial). The administrative review process offers some check on the system. As we know from our own experience, court review of agency decisions can be a cumbersome process. What is most troubling about the states' argument, however, is that even court review cannot solve the problem. Even if an individual is ultimately successful and obtains, for example, a child-care license, the court's favorable disposition has no apparent impact on the individual's listing on the CACI. Thus, the judicial review

afforded by the statute faces the same problem as the original agency determination: It cannot end the stigma or the tangible burden on government rights that an individual listed on the CACI faces.

Again, the Humphries' experience is instructive. The Humphries have taken advantage of every procedure available to them, including the California courts. They went to the dependency court, which found that the allegations were "not true" and returned their children to them. They went to the prosecutor, who dropped all the charges against them. They went to the criminal court, which declared them "factually innocent" and sealed their arrest records. None of this had any effect on their CACI listing. They will remain on the CACI until the investigating agency submits corrected information to the system. There is no effective procedure for the Humphries to challenge this listing, and no way for them to be removed from the listing. The Humphries have been given no opportunity to be heard on the CACI listing.

In sum, we are not persuaded that California has provided a sufficient process for ensuring that persons like the Humphries do not suffer the stigma of being labeled child abusers plus the loss of significant state benefits, such as child-care licenses or employment. The processes in place in California do not adequately reduce the risk of error. In *Valmonte,* which we previously discussed, the New York Central Register had far more procedural protections than the CACI – including a hotline for addressing erroneous listings, a formal investigation

procedure, and two administrative hearings on expungement – yet the Second Circuit found that there was a high risk of erroneous deprivation. 18 F.3d at 995-97, 1003-04. "The crux of the problem with the procedures," according to the Second Circuit, was that New York's "'some credible evidence' standard results in many individuals being placed on the list who do not belong there." *Id.* at 1004. Again, unlike in California, in New York there *was* a detailed procedure for expungement from the list. *Id.* at 995-97. When the court looked at that procedure, it determined that seventy-five percent of those challenging their inclusion on the list were successful. *Id.* at 1003. This confirmed to the court that the original listing determination was suspect. *Id.* at 1003-04.

Here, we do not have comparable statistical data on the rate of error because California has no expungement procedure. However, California's standard for referring names to the CACI – "not unfounded" – is, if anything, more encompassing than New York's word formula – "some credible evidence." Additionally, as we previously noted, even California has recognized, in its task force report, that it may have a high error rate on the CACI, perhaps as high as fifty percent. *Child Abuse and Neglect Reporting Act Task Force Report* at 24. We acknowledge that this figure is not necessarily statistically significant, and we will not treat it as such; however, it does serve as a general indication that a large percentage of the individuals listed on the CACI might have a legitimate basis for expungement. If we can learn any lesson

from New York's experience, it is that California's CACI has the potential to be overinclusive, and perhaps vastly so. We note that as of 2004, there were an estimated 810,000 suspects on the CACI. *Id.* at 7. We echo the Second Circuit's observation: "[I]t [is] difficult to fathom how such a huge percentage of [Californians] could be included on a list . . . unless there has been a high rate of error in determinations." *Valmonte,* 18 F.3d at 1004. We conclude that there is a substantial risk that individuals will be erroneously listed on the CACI, and that California offers insufficient means for correcting those errors.

d. Balancing

Mathews requires that we consider the risk of error in light of the individuals' interest and the government's interest. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 529 (2004) ("The *Mathews* calculus . . . contemplates a judicious balancing of these concerns. . . ."). In the end, this is not a difficult case. The lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the Humphries' due process rights. Undoubtedly, California has a strong interest in protecting its youngest and most vulnerable residents from abuse, but that interest is not harmed by a system which seeks to clear those falsely accused of child abuse from the state's databases. CANRA creates too great a risk of individuals being

placed on the CACI list who do not belong there, and then remaining on the index indefinitely.

Beyond declaring that California's procedural protections are constitutionally inadequate, we do not propose to spell out here precisely what kind of procedure California must create. The state has a great deal of flexibility in fashioning its procedures, and it should have the full range of options open to it. We do not hold that California must necessarily create some hearing prior to listing individuals on CACI. At the very least, however, California must promptly notify a suspected child abuser that his name is on the CACI and provide "some kind of hearing" by which he can challenge his inclusion. *See Goss v. Lopez,* 419 U.S. 565, 578 (1975); Henry J. Friendly, "*Some Kind of Hearing,*" 123 U. Pa. L. Rev. 1267 (1975) (discussing the various forms that a hearing can take). The opportunity to be heard on the allegations ought to be before someone other than the official who initially investigated the allegation and reported the name for inclusion on the CACI, and the standards for retaining a name on the CACI after it has been challenged ought to be carefully spelled out.

Nothing we have said here infringes on the ability of the police, or other agencies, to conduct a full investigation into allegations of child abuse. The need for such investigations – which, we acknowledge, are intrusive and difficult to conduct – is obvious. Nor does anything we have said undermine the ability of appropriate law enforcement agencies to maintain records on such investigations, even if the

investigations do not result in formal charges or convictions. Again, we understand the need for law enforcement to rely on hunches and to collect bits and pieces of information to establish a history or pattern that may lead to formal charges in future cases. The mere maintenance of such investigatory files apart from the CACI does not raise concerns under the Due Process Clause. What California has done is not just maintain a central investigatory file, but attach legal consequences to the mere listing in such files. Once California effectively required agencies to consult the CACI before issuing licenses, the CACI ceased to be a mere investigatory tool. The fact of listing on the CACI became, in substance, a judgment against those listed.

B. *Qualified Immunity*

Having decided that the Humphries' Due Process rights under the Fourteenth Amendment were violated, we next consider whether the individual defendants are entitled to qualified immunity. Officials who violate constitutional rights under color of law are entitled to qualified immunity unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Although the district court did not reach the issue of qualified immunity we may do so where it is clear from the record before us. *See Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1078, 1087 (9th Cir. 2008) (en banc)

(addressing qualified immunity analysis although the district court had found no constitutional violation).

First, Detective Ansberry is entitled to summary judgment in his favor. We have held that "[l]iability under § 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). The Humphries have not presented any evidence that Ansberry was in any way involved in the decision to list the Humphries in the CACI, or to keep them on the CACI.

Next we grant the motion for summary judgment in favor of Sheriff Baca. Under § 1983, a supervisor is only liable for his own acts. Where the constitutional violations were largely committed by subordinates the supervisor is liable only if he participated in or directed the violations. *Id.* There is no evidence that Sheriff Baca had any direct involvement in the decision to list the Humphries on the CACI, or to keep them on the CACI.

We also have no difficulty finding that Detective Wilson is entitled to qualified immunity. We have held that "an officer who acts in reliance on a duly-enacted statute . . . is ordinarily entitled to qualified immunity" which is lost only if it is "so obviously unconstitutional as to require a reasonable officer to refuse to enforce it." *Grossman v. City of Portland,* 33 F.3d 1200, 1209-10 (9th Cir. 1994). The California system, which denied the Humphries their procedural due process rights was not so obviously unconstitutional as to suggest to Detective Wilson that he

ought not abide by CANRA's provisions and report the Humphries for listing on the CACI. A procedural due process analysis that requires a complicated balancing test is sufficiently unpredictable that it was not unreasonable for Detective Wilson to comply with the duly-enacted CANRA provisions. *See Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989). Therefore, Detective Wilson is entitled to qualified immunity for any damages resulting from the denial of the Humphries' procedural due process rights, and we grant summary judgment in his favor on that claim.

C. *Monell Liability*

Unlike Detective Wilson, the County is not entitled to qualified immunity for acting in good faith reliance on state law. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (finding that there is no qualified immunity for local government). Rather, the County is subject to liability under *Monell v. Department of Social Services*, if a "policy or custom" of the County deprived the Humphries of their constitutional rights. 436 U.S. 658, 694 (1978). The district court did not address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights.

We have held that "[i]n order to avoid summary judgment a plaintiff need only show that there is a question of fact regarding whether there is a city custom or policy that caused a constitutional deprivation." *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th

Cir. 2000). CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the Index. Nothing in CANRA, however, prevented the LASD from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. By failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to qualified immunity.

III. CONCLUSION

For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion. We affirm the district court's grant of summary judgment to Detectives Wilson and Ansbery and Sheriff Baca on the grounds of qualified immunity.

AFFIRMED in part; REVERSED in part and REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRAIG ARTHUR HUMPHRIES; WENDY DAWN ABORN HUMPHRIES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LEROY BACA, individually and in his official capacity as Los Angeles County Sheriff; MICHAEL L. WILSON, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; CHARLES T. ANSBERRY, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; BILL LOCKYER, Attorney General, in his official capacity as Attorney General of the State of California,

Defendants-Appellees.

No. 05-56467

D.C. No. CV-03-00697-JVS

OPINION

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
October 19, 2007 – Pasadena, California

Filed November 5, 2008

Before: Jay S. Bybee and
Milan D. Smith, Jr., Circuit Judges,
and Richard Mills,* District Judge.

Opinion by Judge Bybee

COUNSEL

Esther G. Boynton (argued), Beverly Hills, California, for the plaintiffs-appellants.

Mark D. Rutter, Carpenter, Rothans & Dumont, Los Angeles, California; Martin Stein, Alison Turner, Lillie Hsu (argued), Greines, Martin, Stein & Richland LLP, Los Angeles, California, for the defendants-appellees.

Edmund G. Brown Jr., Attorney General of the State of California, David S. Chaney, Chief Assistant Attorney General, James T. Schiavenza, Senior Assistant Attorney General, Marsha S. Miller, Supervising Deputy Attorney General, Paul C. Epstein (argued), Deputy Attorney General, State of California Department of Justice, Office of the Attorney General, Los Angeles, California, for the defendant-appellee.

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* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Carolyn A. Kubitschek, Lansner & Kubitschek, New York, New York, for the amicus National Coalition for Child Protection Reform.

OPINION

BYBEE, Circuit Judge:

Appellants Craig and Wendy Humphries are living every parent's nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them "factually innocent" of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as "not true."

Notwithstanding the findings of two California courts that the Humphries were "factually innocent" and the charges "not true," the Humphries were identified as "substantiated" child abusers and placed on California's Child Abuse Central Index ("the CACI"), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array

of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This case presents the question of whether California's maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does.

I. FACTS AND PROCEEDINGS

A. *The Statutory Scheme*

1. The Child Abuse and Neglect Reporting Act

California maintains a database of "reports of suspected child abuse and severe neglect," known as the Child Abuse Central Index or CACI. CAL. PENAL CODE § 11170(a)(2). California has collected such information since 1965, *see* 1965 Cal. Stat. 1171, and since 1988, the maintenance of the CACI has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), CAL. PENAL CODE §§ 11164-11174.

a. Inclusion in the CACI

There are many different ways a person can find themself [sic] listed in the CACI. CANRA mandates that various statutorily enumerated individuals report instances of known or suspected child abuse

and neglect either to a law enforcement agency or to a child welfare agency. *Id.* § 11165.9. These agencies, in turn, are required to conduct "an active investigation," *id.* § 11169(a), which involves investigating the allegation and determining whether the incident is "substantiated, inconclusive, or unfounded," CAL. CODE REGS. tit. 11, § 901(a) (2008).

In an attempt by the legislature to demonstrate how many negatives it could place in a single provision, CANRA then provides that the agency shall send the California Department of Justice ("CA DOJ") a written report "of every case it investigates of known or suspected child abuse or severe neglect which is determined not to be unfounded," but that the "agency shall not forward a report to the [CA DOJ] unless it has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL CODE § 11169(a). CANRA defines a report as "unfounded" if it is "determined by the investigator who conducted the investigation [1] to be false, [2] to be inherently improbable, [3] to involve an accidental injury, or [4] not to constitute child abuse or neglect." *Id.* § 11165.12(a). There is no further definition of what it means for a report to be "false" or "inherently improbable," and no discussion of the standard of proof by which that determination is to be made. Presumably, a report is "not unfounded" if the investigator determines that it meets none of these four criteria.

CANRA defines two other categories of reports, those that are "substantiated" and those that are "inconclusive." A "substantiated report" means that "the investigator who conducted the investigation" determined that the report "constitute[d] child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect occurred." *Id.* § 11165.12(b). An "inconclusive report" means that "the investigator who conducted the investigation" found the report "not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . occurred." *Id.* § 11165.12(c). Both inconclusive and substantiated reports are submitted to the CA DOJ for inclusion in the CACI. *See id.* §§ 11169(a), (c), 11170(a)(3).

To summarize, we understand section 11169(a), when read in conjunction with section 11165.12, to require agencies to investigate all reports of child abuse. Each reported incident of child abuse must then be categorized as (1) "substantiated," meaning it is more likely than not that child abuse or neglect occurred; (2) "inconclusive," meaning there is insufficient evidence to determine whether child abuse and/or neglect occurred; or (3) "unfounded," meaning the report is false, inherently improbable, an accidental injury, or does not constitute child abuse or neglect. It appears that "substantiated" and "inconclusive" reports include everything that is "not unfounded." The agency must submit both "substantiated" and "inconclusive" reports for inclusion in the CACI.

Given the high standard of proof required for a report to be dismissed as "unfounded" – false or inherently improbable – and the low standard of proof required for a report to be categorized as "substantiated" – more likely than not – with "inconclusive" presumably encompassing everything in between, we understand the minimum evidence required for CANRA to compel the submission of a report to be something less than a preponderance, but more than a scintilla. CANRA further requires that the CA DOJ "shall maintain an index of all reports of child abuse and severe neglect submitted pursuant to" the process described above. *Id.* § 11170(a)(1). The CACI is maintained by means of a computerized data bank. *See People v. Bernstein,* 243 Cal. Rptr. 363, 367 (Cal. Ct. App. 1987).

b. Consequences of Inclusion in the CACI

CANRA states that the CA DOJ shall make the information in the CACI available to a broad range of third parties for a variety of purposes. For example, the information in the CACI is made available

> to the State Department of Social Services, or to any county licensing agency that has contracted with the state for the performance of licensing duties . . . concerning any person who is an applicant for licensure or any adult who resides or is employed in the home of an applicant for licensure or who is an applicant

> for employment in a position having supervisorial or disciplinary power over a child or children, or who will provide 24-hour care for a child or children in a residential home or facility, pursuant to [various statutory sections].

CAL. PENAL CODE § 11170(b)(4). The information is also provided to persons "making inquiries for purposes of pre-employment background investigations for peace officers, child care licensing or employment, adoption, or child placement." CAL. CODE REGS. tit. 11, § 907(b) (2008); *see also* CAL. PENAL CODE § 11170(b)(8). The "Court Appointed Special Advocate program that is conducting a background investigation of an applicant seeking employment with the program or a volunteer position as a Court Appointed Special Advocate" also has access to CACI information. CAL. PENAL CODE § 11170(b)(5).

The scope of CANRA is not limited to California institutions. CANRA makes the CACI information available "to an out-of-state agency, for purposes of approving a prospective foster or adoptive parent or relative caregiver for placement of a child" so long as "the out-of-state statute or interstate compact provision that requires that the information received in response to the inquiry shall be disclosed and used for no purpose other than conducting background checks in foster or adoptive cases." *Id.* § 11170(e)(1). Thus, it appears that if another state's agencies

require CACI information for foster or adoptive purposes, the CA DOJ is also obligated to make it available.[1]

> CANRA provides that agencies obtaining the CACI information are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer.

Id. § 11170(b)(9)(A). The same provision also applies to out of state agencies that receive CACI information. *Id.* § 11170(e)(2).

Although CANRA itself only requires that the CA DOJ make this information available, other statutory provisions mandate that certain agencies consult the CACI prior to issuing a variety of state-issued licenses or other benefits. For example, California Health and Safety Code § 1522.1 provides that "[p]rior to granting a license to, or otherwise approving, any individual to care for children, the [State

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[1] Although the CACI information can apparently be released under these statutes to administrative agencies, private licensing agencies, private employers, or law enforcement entities, we will generally refer to these groups collectively throughout the opinion as "agencies."

Department of Social Services] shall check the [CACI]." CAL. HEALTH & SAFETY CODE § 1522.1(a); *see id.* § 1502(b). Similarly, in order to work as a volunteer in crisis nurseries, California law mandates that "[v]olunteers shall complete a [CACI] check." *Id.* § 1526.8(b)(2). Also, "[p]rior to granting a license to or otherwise approving any individual to care for children in either a family day care home or a day care center, the [State Department of Social Services] shall check the [CACI]." *Id.* § 1596.877(b).[2]

> California Welfare and Institutions Code § 361.4 similarly requires that [w]henever a child may be placed in the home of a relative, or a prospective guardian or other person who is not a licensed or certified foster parent, the county social worker shall cause a check of the [CACI] . . . to be requested from the [CA DOJ]. The [CACI] check shall be conducted on all persons over 18 years of age living in the home.

CAL. WELF. & INST. CODE § 361.4(c). Finally, California has implemented a pilot program through the State Department of Social Services ("DSS") to create a "child-centered resource family approval process" in lieu of existing processes for "licensing foster family homes, approving relatives and nonrelative extended

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[2] We also note that, although it does not specifically mandate the agency to reference the CACI, in language similar to CANRA, § 1596.607 of the Health and Safety Code allows DSS to deny a "trustline applicant" if there is evidence of "substantiated child abuse." CAL. HEALTH & SAFETY CODE § 156.607 [sic].

family members as foster care providers, and approving adoptive families." *Id.* § 16519.5(a). The approval standards under this statute include "utilizing a check of the [CACI]." *Id.* § 16519.5(d)(1)(A)(i). Based on these provisions, it is apparent that the CACI listing plays an integral role in obtaining many rights under California law, including employment, licenses, volunteer opportunities, and even child custody. *See also* Alisha M. Santana, *A Pointer System that Points to the Nonexistent: Problems with the Child Abuse Central Index (CACI)*, 4 WHITTIER J. CHILD & FAM. ADVOC. 115, 115-16 (2004) (describing the case of a grandmother denied custody of her grandchildren because DSS discovered two hits on the CACI matching her name).

c. Removal From the CACI

CANRA requires that at the time the agency forwards the report to the CA DOJ for inclusion in the CACI, "the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the [CACI]." CAL. PENAL CODE § 11169(b). The identified child abuser may obtain the report of suspected child abuse and information contained within their CACI listing. *Id.* § 11167.5(b)(11). Understandably, notified individuals who believe that they have wrongfully been included in the CACI would want to be removed from the CACI as expeditiously as possible. CANRA provides that an individual who was originally listed in the CACI pursuant to an "inconclusive or unsubstantiated report" will be deleted from the CACI after ten

years, as long as no subsequent report containing his or her name is received within that time period. *Id.* § 11170(a)(3). There is no provision for removing an individual who was originally listed in the CACI pursuant to a "substantiated report"; such a person apparently remains listed in the CACI permanently. *See id.* § 11170(a)(1).

CANRA offers no procedure for challenging a listing on the CACI. CANRA does provide that "[i]f a report has previously been filed which subsequently proves to be unfounded, [the CA DOJ] shall be notified in writing of that fact and shall not retain the report." *Id.* § 11169(a). The statute does not describe *who* must notify the CA DOJ of that fact, or how the determination that a report has "subsequently prove[d] to be unfounded" is to be made. CANRA also provides that the CACI "shall be continually updated by the department and shall not contain any reports that are determined to be unfounded." *Id.* § 11170(a)(1). By using the passive voice, CANRA fails to specify who is supposed to determine that a report is unfounded, or how to make that decision in order to remove unfounded reports from the CACI.

Apparently, only the submitting agency can decide if a report has proved unfounded. CANRA provides that "[t]he submitting agencies are responsible for the accuracy, completeness, and retention of the reports," thus suggesting that the submitting agencies are also responsible for removing reports that are determined to be unfounded. *Id.* § 11170(a)(2). Furthermore, as explained above, CANRA defines an

"unfounded report" as "a report that is determined *by the investigator who conducted the investigation* to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." *Id.* § 11165.12(a) (emphasis added); *see id.* § 11165.12(b) (a "substantiated report" means "a report that is *determined by the investigator* . . . ") (emphasis added). Whether this definition solely references the initial determination of listing someone on the CACI, or whether it also constitutes the definition for a continuing obligation to remove someone from the CACI is unclear. These provisions suggest, however, that the investigator and agency that conducted the investigation are responsible for making, and thus correcting, the determination that a report is unfounded.

Although CANRA itself provides no procedure for an individual to challenge a CACI listing, nothing in the statute prevents a submitting agency from enacting some procedure to allow an individual to challenge their listing or seek to have a determination made that a report is "unfounded." *See id.* § 11170(a)(2). CANRA also contemplates that the CA DOJ "may adopt rules governing recordkeeping and reporting," which may allow the CA DOJ to enact some procedure beyond that provided by CANRA. *Id.* § 11170(a)(1). To this point, we are unaware of any regulations that provide additional regulatory procedures for challenging a listing on the CACI or the validity of the underlying report. To the contrary, the CA DOJ explicitly "presumes that the substance of

the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency." CAL. CODE REGS. tit. 11, § 904 (2008).

B. *The Humphries' Nightmare*

The Humphries' nightmarish encounter with the CANRA system began on March 17, 2001, when S.H., Craig's fifteen year-old daughter from a previous marriage, took their car and drove to her biological mother's home in Utah. S.H. had previously lived in Utah with her biological mother and stepfather and their three younger children. In June 2000, S.H.'s biological mother called Craig and said she wanted S.H. to live with the Humphries in Valencia, California, on a trial basis. The night of March 17, S.H. took the Humphries' car without their knowledge, drove to her mother's home in Utah, and reported that the Humphries had been abusing her for several months. An emergency room physician diagnosed "non-accidental trauma, with extremity contusions."

1. The Humphries' Arrest and Inclusion in the CACI

Based on an investigation from the Utah police, the victim's statement, and emergency room records describing the victim's allegations, on April 11, 2001, Michael L. Wilson, a detective for the Family Crimes Bureau of the Los Angeles County Sheriff's Department ("LASD"), obtained probable cause warrants to

arrest the Humphries for cruelty to a child, CAL. PENAL CODE § 273a(a), and torture, *id.* § 206. On April 16, Detective Wilson, accompanied by fellow detective Charles Ansberry, arrested Craig and Wendy Humphries, and booked them on the single charge of felony torture under California Penal Code § 206. The same day, a Sheriff's deputy, without a warrant, picked up the Humphries' two other children from their schools and placed them in protective custody.[3] Both children denied any fear of abuse or mistreatment and indicated their desire to return home. Custody of the children was then transferred to the County Department of Children and Family Services, which placed the children in foster care.

On April 17, 2001, the day after the Humphries were arrested, Detective Wilson completed a child abuse investigation report identifying the Humphries' case as a "substantiated report" of child abuse.[4] Pursuant to CANRA, this information was sent to the CA DOJ, which in turn created a CACI listing identifying

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[3] The Humphries have asserted a § 1983 claim regarding the warrantless seizure of the children. That claim is not before us on this appeal.

[4] At the time that Detective Wilson filed his report, a "substantiated" report of child abuse was defined as one where the investigator found "credible evidence" of abuse. CAL. PENAL CODE § 11165.12(b) (2001). As discussed above, § 11165.12 has since been amended to define a "substantiated" report as one "determined by the investigator who conducted the investigation to constitute child abuse or neglect . . . based upon evidence that makes it more likely than not that child abuse or neglect . . . occurred." *Id.* § 11165.12(b).

Craig and Wendy Humphries as child abuse suspects with a "substantiated" report.

2. Judicial Proceedings Exonerating the Humphries

a. The Criminal Case

On April 18, 2001, Detective Wilson filed a complaint in the Los Angeles County Superior Court, charging the Humphries with corporal injury to a child, CAL. PENAL CODE § 273d(a), and cruelty to a child by endangering health, *id.* § 273a(b), both misdemeanors.

On August 29, 2001, the Humphries' criminal case was dismissed.[5] The prosecutor had learned that in November 2000, Dr. Isaac Benjamin Paz surgically removed a melanoma on S.H.'s shoulder. S.H. had follow-up visits with Dr. Paz in December 2000 and

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[5] There is some dispute as to whether the felony charge for which the Humphries were originally booked on April 16 is distinct from the misdemeanor charge filed on April 18. The Humphries contend that the district attorney rejected the attempt to file a felony action against them but allowed the case to be filed for misdemeanor consideration. According to the Humphries it was this misdemeanor complaint that was dismissed on August 29, 2001. Because this case is before us on a motion for summary judgment by the state and county parties, we assume the Humphries' account to be true, and from the record it appears that the Humphries were never indicted on the felony charge. Regardless, the petition to seal and destroy their arrest records indicates that the disposition of the torture charges was a "court dismissal."

March 2001, periods that corresponded with S.H.'s claims of abuse. On all these occasions, Dr. Paz examined S.H.'s entire body, and saw no sign of abuse. The prosecutor determined that this information "contradict[ed] the basic part of [S.H.'s] testimony that she was injured during the entire time" and agreed that the Humphries criminal case for the misdemeanor charges should be dismissed in furtherance of justice. The felony torture charges on which the Humphries had originally been booked were also dismissed.

The Humphries then successfully petitioned the criminal court under California Penal Code § 851.8 for orders finding them "factually innocent" of the felony torture charge,[6] and requiring the arrest

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[6] The Humphries argue that the district court erred in concluding that the finding of "factual innocence" was not admissible as evidence under California law. We disagree. California Penal Code § 851.8(i) clearly states that a finding of factual innocence "shall not be admissible as evidence in any action." CAL. PENAL CODE § 851.8(i). The Humphries contend that § 851.8(i) is qualified by § 851.8(k), which provides that sealed records may be "submitted into evidence" on "a showing of good cause" in a civil action brought by the arrested person against the arresting officers or law enforcement jurisdiction. CAL. PENAL CODE § 851.8(k). Section 851.8(k), however, does not allow the "finding of factual innocence" to be submitted into evidence, but rather the underlying "sealed records."

Nevertheless, neither § 851.8(i) nor § 851.8(k) applies to our use of the factual innocence determination in this opinion. Here, even if the Humphries had never been arrested at all, such that there were no § 851.8 arrest warrants to seal, Detective Wilson could have still filed a "substantiated report" resulting in their

(Continued on following page)

records pertaining to that charge be sealed and destroyed.[7] A finding of factual innocence means that the court found "that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." CAL. PENAL CODE § 851.8(b).

b. The Juvenile Court Case

On April 17, 2001, in separate, non-criminal proceedings, Detective Wilson requested that Los Angeles County file a juvenile court dependency petition to have the Humphries' two children declared dependent children of the juvenile court based on the

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listing on the CACI. Our determination as to the constitutionality of CANRA is thus not dependent on the underlying arrest. We therefore discuss the factual innocence finding, not as a matter of evidence, but rather as illustrative of the legal quagmire in which the Humphries find themselves. Under California law, they could petition a court for a "factual innocence" determination, but could not challenge their inclusion on the CACI.

[7] The Humphries argue that the district court erred in disregarding the sealing orders as they relate to the information included in their CACI listing. The district court found that the Humphries' contention that the Appellees were maintaining records in violation of the Sealing Orders was not properly before the court because the claim was not made in the complaint. We find that the allegations contained in paragraphs 5 and 6 of the complaint sufficiently allege the issue by stating that "the order . . . requires that plaintiffs' arrest records be sealed and scheduled for future destruction. . . . Nevertheless, defendants still refuse to expunge plaintiffs' CACI records." Insofar as this issue is relevant to future proceedings, the district court may consider the claim.

fact that their "sibling has been abused or neglected." On April 19, the County filed a dependency petition against the Humphries based on S.H.'s allegations. After a hearing on June 12, the juvenile court ordered that the Humphries retain custody of their children, and dismissed all counts as "not true."[8]

3. The Humphries Seek Removal from the CACI

As required by CANRA, in May 2001, the Humphries were notified that they were listed in the CACI. The notice informed them that if they believed the report was unfounded, and they desired a review, that they should address their request to Detective

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[8] Under the California Rules of Court, the juvenile court is only authorized to find allegations "true" or "not proved." *See* CAL. CT. R. 1450(f) & (h) (renumbered and amended as 5.684 effective Jan. 1, 2007). The state and county parties argue that the juvenile court's "not true" finding does not mean that the allegations are affirmatively false. Regardless, there is no dispute that the juvenile court wrote that the allegations were "not true." Any argument regarding whether the judge should or should not have done so should have been made at the time of the juvenile court proceedings.

The Humphries also argue that the district court erred in failing to give collateral estoppel effect to the juvenile court's "not true" determination. The district court stated in a footnote that while the collateral estoppel argument "would appear to have merit, the Court need not address that issue in view of its ruling." If the parties provide a reason for addressing the issue in light of this opinion, on remand the district court shall make a more definitive finding of the collateral effect of the juvenile court's judgment.

Wilson. In May 2002, the Humphries contacted LASD's Family Crimes Bureau through their attorney. They discovered that Detective Wilson no longer worked at the Bureau and there was no available procedure for them to challenge their listing in the CACI. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney that after conducting an investigation, the LASD would not reverse its report labeling the Humphries as "substantiated" child abusers for the purposes of the CACI. Becker indicated that the fact that charges were filed "would indicate to us that some sort of crime did occur" and the fact that the case was dismissed "would not negate the entries" into the CACI.

In October 2003, the CA DOJ asked LASD to complete a confirmation questionnaire regarding the Humphries' CACI listing. The questionnaire was answered by a civilian clerical worker who confirmed that the report was still "substantiated" as of October 31, 2003. Despite the fact that two independent California tribunals had found that the allegations underlying the Humphries' CACI listing were "not true" and that the Humphries are "factually innocent," the CA DOJ continues to list the Humphries in the CACI as substantiated child abusers. Furthermore, because the Humphries were listed pursuant to a "substantiated report," they will remain listed on the CACI indefinitely.

In addition to the harm already dealt to the Humphries' reputation by appearing on a list of

actual or suspected child abusers, the Humphries have also alleged that the CACI now places a burden on their ability to pursue some of their normal goals and activities. The Humphries have indicated that they are hesitant to seek these opportunities for fear that the CACI listing will both influence their ability to obtain certain benefits and further injure their already damaged reputation. For example, the Humphries have expressed a desire to work or volunteer at the Florence Crittenton Center in Los Angeles, a community center offering child care and a variety of other services. Bernice Williams, the Human Resources Manager at the center stated, by affidavit, that all adults must undergo a CACI check prior to obtaining clearance to volunteer or teach at the center. Thus, the Humphries will have to submit to a CACI search before even having an opportunity to volunteer or work at the center.

Similarly, Wendy currently works as a special education teacher and resource specialist at a public school in California. She possesses a number of teaching credentials that must be periodically renewed in order to maintain her current employment – a renewal process that requires her to apply to the California Commission on Teacher Credentialing ("CCTC"). The Humphries have introduced evidence indicating that the information available on the CACI

might have an impact on her ability to obtain educational credentials.[9]

Wendy has also indicated a desire to pursue a degree in psychology from the University of California at Los Angeles. Two courses of interest within the psychology department, 134 A/D and 134 B/E, place all of the students in a child care program licensed by the state of California. To enroll in these classes, all potential students must pay for and submit to a CACI check.

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[9] The Humphries introduced as an exhibit a letter by Peter P. Castillo, an attorney for the DSS. The letter states that "[t]he law requires that [the Community Care Licensing Division ("CCLD")] check all child care applicants and employees against the CACI" and goes on to note that CCLD will "share information" with CCTC if requested. In response, the state introduced an affidavit from Castillo reporting that the CCTC "is not one of the agencies authorized by statute to receive [CACI] information" and that his statement in the letter regarding shared information only referred to information that CCLD was permitted to disclose. Based on this exchange and without giving the Humphries an opportunity to respond, the district court found that "it is clear that Wendy cannot and will not be harmed in her pursuit of a teaching credential as a result of being listed on the Index." Viewing the evidence in the light most favorable to the Humphries, Castillo's measured statement did not require the broad conclusion reached by the district court. Thus, insofar as the need arises on remand, the parties are free to introduce additional evidence regarding the obstacles CACI places on the opportunity for Wendy to pursue her credentials.

4. Procedural History

The Humphries initiated this action in federal district court on August 27, 2002. The Humphries' First Amended Complaint originally included eight counts based on state and federal claims, but on April 14, 2003, the district court dismissed all the state law counts on a Rule 12(b)(6) motion. In the remaining three claims, the Humphries sought relief pursuant to 42 U.S.C. § 1983. They alleged that three actions by California officials deprived them of various rights under the United States Constitution: the Humphries' arrest and incarceration, the Humphries' initial and continued inclusion in CACI, and the seizure and subsequent placement of the Humphries' children in temporary protective custody.

The Humphries sought three types of relief based on these claims. The Humphries demanded damages for the constitutional violations resulting from the government's conduct. In addition to damages, on the allegations related to the Humphries' listing on the CACI, the Humphries sought an injunction ordering the County of Los Angeles to notify the CA DOJ that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD. The Humphries also sought a judicial declaration that CANRA and the County's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records.

Appellees, the County of Los Angeles, Sheriff Leroy D. Baca, and Detectives Wilson and Ansberry ("County Appellees") and California Attorney General Bill Lockyer ("State") (collectively "Appellees"), moved for summary judgment on all claims. The district court denied Appellees' motion for summary judgment on the § 1983 claim regarding the warrantless seizure of the children, but granted Appellees' motion for summary judgment on the § 1983 claim arising out of the Humphries' initial and continued inclusion in the CACI, as well as the § 1983 claim arising out of the Humphries' arrest and incarceration. The Humphries appeal the grant of summary judgment with regard to their claims relating to their inclusion in the CACI, arguing that the Appellees' conduct in listing their names on the CACI and making CACI-related information available to third parties violates their right to due process under the Fourteenth Amendment.

II. ANALYSIS

To establish a prima facie case under § 1983, the Humphries must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct violated a right secured by the Constitution and laws of the United States. *West v. Atkins,* 487 U.S. 42, 48 (1988). Furthermore, the Supreme Court has insisted that even if there is a qualified immunity issue, we must still consider the threshold question of the "existence or nonexistence of a constitutional right as the first

inquiry." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). There is no question that the Humphries' listing on the CACI occurs under color of state law. Thus, the issue in this appeal is whether the initial and continued inclusion of the Humphries on the CACI deprives them of any rights secured by the Constitution and laws of the United States. We find that it does. Accordingly, after our discussion of the existence of a constitutional violation we consider whether the individual and institutional Appellees are entitled to immunity for their acts.

A. *Procedural Due Process*

The Humphries argue that Appellees violated their Fourteenth Amendment right to procedural due process by listing and continuing to list them on the CACI, without any available process to challenge that listing. In procedural due process claims, the deprivation of a constitutionally protected interest "is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Our analysis proceeds in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460 (1989) (internal citations omitted). The district court found that the Humphries' listing on the CACI did not deprive them of any constitutionally protected

liberty or property interest.[10] The court did not reach the second step of the due process analysis.

1. Deprivation of a Protected Liberty Interest

The Humphries contend that they have a liberty interest under the "stigma-plus" test of *Paul v. Davis*, 424 U.S. 693 (1976). The Humphries argue that the stigma of being listed in the CACI as substantiated child abusers, *plus* the various statutory consequences of being listed on the CACI constitutes a liberty interest, of which they may not be deprived without process of law. We agree.[11]

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[10] We review a district court's grant of summary judgment *de novo*. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). In conducting such a review, we must ensure that the district court correctly applied the law and that, viewing the evidence in the light most favorable to the non-moving party, no genuine issues of material fact remain. *Id.*

[11] The Humphries also argue that they have a protected liberty interest created by the mandatory language in CANRA; a protected liberty interest in informational and familial privacy arising under the California Constitution, *see Burt v. County of Orange*, 15 Cal. Rptr. 3d 373, 381-82 (Cal. Ct. App. 2004); a protected liberty interest in familial privacy and autonomy under the federal constitution; and a protected liberty interest created by the sealing orders and California Penal Code § 851.8. Because we hold that the Humphries have been deprived of due process of law, and because it is not evident they would be entitled to any greater process or remedy if they successfully pressed these remaining liberty interests, we will not reach the merits of these arguments. We also decline to reach the Humphries' ill-developed claims to substantive due process

(Continued on following page)

In *Wisconsin v. Constantineau,* the Supreme Court held that a liberty interest may be implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." 400 U.S. 433, 437 (1971). The following year the Court stated that a government employee's liberty interest would be implicated if he were dismissed based on charges that "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). In *Paul v. Davis,* the Supreme Court clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." 424 U.S. 693, 711 (1976). This holding has come to be known as the "stigma-plus test." *See Hart v. Parks,* 450 F.3d 1059, 1070 (9th Cir. 2006).

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based on a right of parents with children to live without unwarranted government interference and the Appellees' conduct relating to the sealing orders. Moreover, it is quite apparent to us that the same qualified immunity analysis would apply to the due process claims regardless of the underlying liberty interest asserted. Nevertheless, if the Humphries believe that these interests require a different due process or qualified immunity analysis than we have ordered here, they are free on remand to raise those claims before the district court and explain why the district court should address them.

a. Stigma

As the district court found, being labeled a child abuser by being placed on the CACI is "unquestionably stigmatizing." We have observed that there is "[n]o doubt . . . that being falsely named as a suspected child abuser on an official government index is defamatory." *Miller v. California,* 355 F.3d 1172, 1178 (9th Cir. 2004); *see also Valmonte v. Bane,* 18 F.3d 992, 1000 (2d Cir. 1994) (finding it beyond dispute that inclusion on a child abuse registry damages reputation by "branding" an individual as a child abuser). Indeed, "no conduct so unequivocally violates American ethics as . . . sexual predation upon the most vulnerable members of our society." *Nicanor-Romero v. Mukasey,* 523 F.3d 992, 999 (9th Cir. 2008) (citation omitted). The horror deepens when such abuse occurs at the hands of the parents, who have an obligation to protect their children. *See id.* at 1013 (Bybee, J., dissenting) ("Our recognition that the victim's vulnerability or intimate relationship with her victimizer can render an act inherently base or vile simply reflects contemporary American mores.").

The Court has identified stigma on the basis of lesser accusations. In *Constantineau,* the chief of police had posted the plaintiff's name on a list that prohibited her from purchasing alcohol pursuant to a state statute forbidding the sale of alcoholic beverages to persons who had become hazardous by reasons of their "excessive drinking." 400 U.S. at 434-35. In *Paul,* the plaintiff's picture appeared on a flyer of individuals who were suspected of shoplifting. 424

U.S. at 695. In both cases the Court found stigma. *Constantineau,* 400 U.S. at 435-37; *Paul,* 424 U.S. at 697, 701 (stating that imputing criminal behavior to an individual is generally considered "defamatory per se" and implicitly finding stigma by holding that stigma alone is insufficient). Being labeled a child abuser is indisputably more stigmatizing than being labeled an excessive drinker or a shoplifter. Indeed, to be accused of child abuse may be our generation's contribution to defamation per se, a kind of moral leprosy.

b. Plus

The more difficult issue is whether the Humphries can satisfy the "plus" test. The Humphries must show that, as the result of being listed in the CACI, "a right or status previously recognized by state law was distinctly altered or extinguished." *Paul,* 424 U.S. at 711; *see also Siegert v. Gilley,* 500 U.S. 226, 233 (1991) (reaffirming that an injury to reputation by itself is not a protected liberty interest under the Fourteenth Amendment).

As the Court explained in *Paul,* when the chief of police in *Constantineau* posted the plaintiff's name on a list forbidding the sale of alcohol to her, it "significantly altered her status as a matter of state law" by depriving her "of a right previously held under state law [–] the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul,* 424 U.S. at 708. The Court concluded that "it was

that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Id.* at 708-09.

In *Paul* itself, the Louisville Chief of Police placed Davis' name on a flyer distributed to Louisville merchants containing a list of individuals thought to be active in shoplifting. *Id.* at 695. In contrast to the mandatory nature of the statute in *Constantineau,* the flyer merely "came to the attention" of Davis' supervisor who warned him not to repeat his actions in the future. *Id.* at 696. The Court found that this harm to Davis' reputation was not sufficient to create a liberty interest. *Id.* at 712. Notably, no law had required the Chief of Police to distribute this flyer, nor did any law require employers to check the list. Thus, although any impairment to Davis' employment opportunities "flow[ed] from the flyer in question," his injury only occurred because the flyer happened to have "c[o]me to the attention of [his] supervisor." *Id.* at 696-97.

As a preliminary matter, the Appellees contend that the Humphries' attempt to satisfy the "plus" test is foreclosed by our decision in *Miller v. California,* 355 F.3d 1172 (9th Cir. 2004). In *Miller,* we confronted different questions concerning the rights of grandparents listed on the CACI. The Millers' three grandchildren had been removed from their parents' home, and the Millers were eventually named the children's guardians. *Id.* at 1173-75. In the meantime, as a result of a doctor's concern about possible sexual abuse, Charles Miller's name was listed on the CACI.

Id. at 1174-75. The Millers brought suit to clear their names and argued that county employees, by placing Charles Miller's name on the CACI, had conspired to deprive them of a liberty interest to associate with their grandchildren. *Id.* at 1173-74. We held that the Millers had no "substantive due process right to family integrity or association as noncustodial grandparents of children who are dependents of the court, nor of a liberty interest in visiting their grandchildren." *Id.* at 1176.

In a separate argument, Charles Miller argued that he had suffered a stigma-plus injury to his reputation and had been denied an opportunity to be heard on the deprivation. *Id.* at 1177. We concluded that Miller had shown injury to his reputation, but could not establish the "plus" because he was "not legally disabled by the listing [on the CACI] alone from doing anything they otherwise could do." *Id.* at 1179. As we observed, the Millers were in fact awarded guardianship of their grandchildren after Charles' name had been placed on the CACI. The only "plus" alleged in *Miller* was a fundamental liberty interest in preserving family association. *Id.* at 1178. We held that because grandparents have no constitutionally protected liberty interest in a relationship with their grandchildren, the Millers could not allege "plus" on those grounds. *Id.*

Significantly, we expressly declined to address whether the mere presence of Miller's name on the CACI denied him due process "because CANRA provides no procedure by which those suspected of

being child abusers can challenge the allegations against them." *Id.* at 1179 n.4. The argument had not been properly presented to the district court and was not properly before us. We also did not address whether requiring agencies to search the CACI prior to issuing a license constitutes a viable "plus." We now take the opportunity to address these issues left open in *Miller*.

The Humphries allege more than mere reputational harm – being listed on the CACI alters their rights in two general ways. First, state statutes mandate that licensing agencies search the CACI and conduct an additional investigation prior to granting a number of rights and benefits. These rights include gaining approval to care for children in a day care center or home, CAL. HEALTH & SAFETY CODE § 1596.877(b), obtaining a license or employment in child care, *id.* § 1522.1(a), volunteering in a crisis nursery, *id.* § 1526.8(b)(2), receiving placement or custody of a relative's child, CAL. WELF. & INST. CODE § 361.4(c), or qualifying as a resource family, *id.* § 16519.5(d)(1)(A)(i). These benefits are explicitly conditioned on the agency checking the CACI and conducting an additional investigation. Second, information in the CACI is specifically made available to other identified agencies: state contracted licensing agencies overseeing employment positions dealing with children, CAL. PENAL CODE § 11170(b)(4); persons making pre-employment investigations for "peace officers, child care licensing or employment, adoption, or child placement," *id.* § 11170(b)(8); individuals in

the Court Appointed Special Advocate program conducting background investigations for potential Court Appointed Special Advocates, *id.* § 11170(b)(5), and out-of-state agencies making foster care or adoptive decisions, *id.* § 11170(e)(1). Although these agencies are not explicitly required by CANRA to consult the CACI, they may, as a practical matter, be required to do so by their own regulations or practices, as discussed below. Thus, inclusion in the CACI alters the Humphries' legal rights or status in a variety of ways that Californians who are not listed on the CACI are not subject to: applying for custody of a relative's child, becoming guardians or adoptive parents (inside or outside of California), obtaining a license for child care, becoming licensed or employed in a position dealing with children, obtaining employment as a peace-officer, and involvement in adoption and child placement. We have mentioned, and the district court found, that the Humphries were directly affected in their eligibility to work or volunteer at a local community center. The Humphries also introduced evidence indicating that Wendy was affected in her ability to renew her teaching credentials.

We recognize that being listed on the CACI may not fully extinguish the Humphries' rights or status. Agencies that obtain information from the CACI are responsible for "drawing independent conclusions regarding the quality of the evidence disclosed." *Id.* § 11170(b)(9)(A). Thus, for example, inclusion on the CACI does not necessarily bar the Humphries from obtaining a license for child care, but it does

guarantee that the licensing entity will conduct an investigation anew before issuing or de ving the license. However, we need not find that an agency will necessarily deny the Humphries a license to satisfy the "plus" test. Outright denial would mean that a listing on the CACI has extinguished the Humphries' legal right or status. Rather, *Paul* provides that stigma-plus applies when a right or status is "altered *or* extinguished." 424 U.S. at 711(emphasis added).

We hold that where a state statute creates both a stigma and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated. A tangible burden exists in this context where a law effectively requires agencies to check a stigmatizing list and investigate any adverse information prior to conferring a legal right or benefit. As outlined above, California created the CACI via CANRA and explicitly requires agencies to consult the CACI and perform an independent investigation before granting a number of licenses and benefits. This requirement places a tangible burden on a legal right that satisfies the "plus" test.

We find that a tangible burden also exists where the plaintiff can show that, as a practical matter, the law creates a framework under which agencies reflexively check the stigmatizing listing – whether by internal regulation or custom – prior to conferring a legal right or benefit. CANRA appears to create such a legal framework. CANRA explicitly provides

that a variety of agencies will have access to the CACI, and we cannot turn a blind eye to the actions of these other agencies merely because they are not explicitly required by statute to receive CACI information.

The record before us on this latter point is admittedly sparse. Nevertheless, as a practical matter, it is difficult to imagine that an agency charged with protecting California's children – through granting or denying licenses to work in child care, allowing people to engage in adoption or child-placement services, or considering potential Court Appointed Special Advocates – would fail to consult the CACI. There is possibly no information more relevant to determining whether a person should be permitted to have a license to work or care for children than whether that person has abused an innocent child in the past. As Bernice Williams, the Human Resources Manager at the Florence Crittenton Center in Los Angeles stated in her affidavit, "Before any adult is cleared to teach at our school, to work at our day care center, or to work or volunteer anywhere within our facility, he or she must undergo Livescan screening, including a [CA DOJ CACI] check." We would be surprised to hear anything differently from other agencies or entities responsible for providing for the safety and education of children. Indeed, on top of the need to protect California's youth, hiring or giving a license to someone without checking the CACI could potentially lead to tort liability under California law. *See Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d

12, 24-25 (Cal. Ct. App. 2000) ("[I]n California, an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him. [T]he theory of negligent hiring here encompasses the *particular risk of molestation by an employee* with a history of this specific conduct.") (internal citations and quotations omitted). Once an agency consults the CACI and finds adverse information, CANRA requires the agency to conduct an investigation and come to its own conclusion. CAL. PENAL CODE § 11170(b)(9)(A)

Viewing the evidence in the light most favorable to the Humphries, we conclude that California has implemented a system whereby the CACI is reflexively consulted prior to the conferral of legal rights or benefits under California law, even where the statute does not necessarily require agencies to check the list on its face. The CANRA both stigmatizes the Humphries and creates an impediment to the Humphries' ability to obtain legal rights. The Humphries have asserted the existence of a sufficient liberty interest under the stigma-plus test, of which they may not be deprived without due process of law.

Our holding is consistent with *Paul.* In *Paul,* the Court was concerned that every insult by a police officer might create a due process right and turn the Fourteenth Amendment into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. This

concern that "a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee," *id.* at 710, is not triggered here. Our decision is limited to those "stigma-plus" situations where both the defamatory statement and the tangible burden on a legal right are statutorily created. In *Paul,* individual officers independently chose to distribute a leaflet, and the stigmatizing language in the leaflet just happened to come to the attention of the plaintiff's private supervisor. In contrast, the burdens on the Humphries' abilities to obtain various licenses and other legal rights from the state of California are the result of state statutes creating the CACI, instructing state officers to put certain information on the CACI, and effectively mandating that various entities consult the CACI. The CACI is not just haphazard, second-hand information that happens to reach the ears of an employer. This case does not resemble the sort of state-court tort case that *Paul* feared.

In reaching this holding, we find the Second Circuit's reasoning in *Valmonte v. Bane* persuasive. 18 F.3d 992 (2d Cir. 1994). In *Valmonte,* the Second Circuit heard a challenge to the New York Central Register of Child Abuse and Maltreatment. Under the New York scheme, the Department of Social Services determined whether an allegation of child abuse was "indicated" or "unfounded." *Id.* at 995. If there was "some credible evidence" supporting a complaint, the report was deemed "indicated" and went into the

Central Register; otherwise, it was deemed "unfounded," expunged from the Central Register, and destroyed. *Id.* As in California, state agencies, private businesses, and licensing agencies were required to check whether potential employees or applicants were on the Central Register. *Id.* The agency or business could hire the person only if the employer maintained a written record explaining why the person was suitable for employment or a license. *Id.* at 996. The court found that because agencies and employers would learn of Valmonte's inclusion on the Central Register "by operation of law . . . and . . . likely . . . will choose not to hire her due to her status" the New York scheme "[did] not simply defame Valmonte, it place[d] a tangible burden on her employment prospects." *Id.* at 999, 1001. The Second Circuit explained that "[t]his is not just the intangible deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state." *Id.* at 1001. *Valmonte* stands for the proposition that to satisfy stigma-plus, a child abuse registry does not need to create a per se bar to employment; it is sufficient that a child abuse registry, by operation of law, creates a "statutory impediment" or a "tangible burden" to being hired. *Id.* at 1001-02. *See also Dupuy v. Samuels,* 397 F.3d 493, 503-04, 509-11 (7th Cir. 2005) (finding that where "child care workers effectively are barred from future employment in the child care field once an indicated finding of child abuse or neglect against them is

disclosed to, and used by, licensing agencies" a protected liberty interest is "squarely implicate[d]" under *Paul*).

Appellees argue that the CACI differs from the statute in *Valmonte,* because there is no requirement in California that an agency maintain a written record explaining why the person was suitable for employment or other government right. We disagree. The CACI requires agencies to undergo the same investigation to independently establish eligibility for a government benefit. The mere fact that agencies in California are not required to write anything down does not place any less of a burden on the Humphries' ability to obtain employment, a license, or custody than Valmonte experienced under the New York statute.

We emphasize that an injury that results merely from simple defamation is not a constitutional liberty interest under the "stigma-plus" test. *Siegert v. Gilley,* 500 U.S. 226, 233-34 (1991). Employment, licensing, custody, or other legal rights under California law are not refused merely because of the deleterious effect of a bad reputation. By operation of law, California has effectively required agencies to consult the CACI, agencies will have to conduct an additional investigation to determine if the Humphries should be eligible for a government benefit, and those agencies will therefore be more hesitant to issue that benefit. As in *Valmonte,* the Humphries will not lose these benefits based merely on their reputation, these benefits "will be refused . . . simply because [their]

inclusion on the list results in an added burden on employers who will therefore be reluctant to hire [them]." 18 F.3d at 1001.

We note that the Eleventh Circuit, in *Smith v. Siegelman*, denied a stigma-plus claim where the plaintiff was designated a child sexual abuser and placed on Alabama's Central Registry on Child Abuse and Neglect. 322 F.3d 1290, 1296-98 (11th Cir. 2003). We think *Smith* rests on a different footing. It appears that Alabama did not mandate that potential employers consult the Registry; rather, "the information on the Registry is made available to an employer or potential employer where the employment involves care or supervision of children." *Id.* at 1297; *see also* ALA. CODE § 26-14-8(d) (providing that the information in the registry "may be made available" to employers).[12] Accordingly, the Eleventh Circuit held that the Alabama scheme was governed by *Paul* because the plaintiff "was [not] denied any right or status other than his not being branded a child sexual abuser." *Id.* at 1297. As we have explained, the CACI is more than a registry that an employer "may"

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[12] Our understanding is that Alabama did not require employers to consult the Alabama registry, and therefore that *Siegelman* is closer to *Paul* than our case. If Alabama did require employers to consult the Alabama Registry and conduct further investigation, then we respectfully disagree with the Eleventh Circuit's holding that there is no "plus." Such a holding would fail to recognize that in *Paul* the reputational damage occurred inadvertently, and not as the result of a statutory mandate.

consult. By law, licensing agencies must consult the CACI, investigate, and use the CACI information in making their licensing decisions, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 1522.1(a), 1526.8(b)(2), 1596.877(b). The CACI is much closer to the New York Central Register than the Alabama Registry. *See Valmonte*, 18 F.3d at 1002 (explaining that "the injury associated with the [New York] Central Register is not simply that it exists, or that the list is available to potential employers" but rather that "employers *must* consult the list.").

In addition, the Eleventh Circuit either did not have evidence of or did not consider the possibility that as a result of the statutory framework other entities were effectively required to consult the registry as a matter of internal rule or custom. To the extent that the Eleventh Circuit refuses to recognize a liberty interest where the state functionally requires agencies to consult a stigmatizing list prior to conferring a government benefit, we must disagree. A state can alter a legal right or status without using the word "must" – the word "may" in conjunction with a rule or custom of "must" can equally deprive a citizen of a liberty interest giving rise to a procedural due process claim.

Thus, we conclude that the Humphries' legal rights or status have been altered. First, California has explicitly required some agencies to search a stigmatizing listing and conduct an additional investigation before issuing a license or benefit under state law. Second, California has made CACI information

available to a variety of other agencies, and the Humphries have introduced evidence that those agencies – especially agencies charged with ensuring the safety and well-being of children – reflexively check the CACI before issuing a government license or benefit. Thus, being listed on the CACI places an added burden on entities wishing to confer legal rights or benefits, makes the chances of receiving a benefit conferred under California law less likely, and practically guarantees that conferral of that benefit will be delayed. Accordingly, we hold that the Humphries have satisfied the first step of the procedural due process analysis: They have a liberty interest in both their good name and using it to obtain a license, secure employment, become guardians, volunteer or work for CASA, or adopt. Listing the Humphries on the CACI places a tangible burden on their ability to exercise this liberty interest. We proceed to consider whether they have been deprived of this interest without due process of law.

2. Adequacy of the Procedural Safeguards

The Humphries must show that the procedural safeguards of their liberty interest established by the state are constitutionally insufficient to protect their rights. *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460 (1989). California currently provides some minimal safeguards against erroneously listing someone on the CACI. In the first place, a reporting agency must conduct "an active investigation and determine[ ] that the report is not unfounded." CAL. PENAL

CODE § 11169(a). Once the agency creates the report and forwards it to the CA DOJ, if a report "subsequently proves to be unfounded" the CA DOJ has a duty to "not retain the report." *Id.* Although this entire process is spelled out in the passive voice, it appears that the agency has the duty to correct its files and thus to decide if they are unfounded. *See id.* § 11170(a)(2) ("The submitting agencies are responsible for the accuracy, completeness, and retention of the reports."). CANRA also provides that the CACI "shall be continually updated by the [CA DOJ] and shall not contain any reports that are determined to be unfounded." CAL. PENAL CODE § 11170(a)(1). Once a report has been made to the CA DOJ and an entry made on the CACI, "the agency shall also notify in writing the known or suspected child abuser that he or she has been reported to the [CACI]." *Id.* § 11169(b).

A person who believes he has been wrongfully listed on the CACI has two possible remedies under CANRA. First, a listed person might try to get the agency who originally reported the information to the CACI to correct its reports. As noted above, it appears that California agencies have a general duty to maintain accurate records and to advise CA DOJ of any report that subsequently proves unfounded. CAL. PENAL CODE §§ 11169(a), 11170(a)(1). CANRA does not identify how an agency is to ensure that it has accurate records or who is responsible for correcting any errors. The CA DOJ's responsibility is limited to ensuring that the CACI "accurately reflects the report

it receives from the submitting agency" – it does not appear to have any duty to ensure the accuracy of the report itself. *Id.* § 11170(a)(2); CAL. CODE REGS. tit. 11, § 904 (2008) (stating that the CA DOJ "presumes that the substance of the information provided is accurate and does not conduct a separate investigation to verify the accuracy of the investigation conducted by the submitting agency"). At best, CANRA implies that reports are subject to correction "by the investigator who conducted the investigation." *Id.* § 11165.12. However, California provides no formal mechanism for requesting that an investigator review a report or for appealing an investigator's refusal to revisit a prior report. Thus, for this first avenue of obtaining relief, at best an informal process exists in which the person seeking review must contact the agency blindly and hope the investigator is responsive. It is not clear what a person seeking review is to do if the investigator has transferred from the agency, retired, or died.

Second, the person may rely on a licensing or employing agency to conduct its own investigation and to "draw[] independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer." *Id.* § 11170(b)(9)(A). Indeed, no particular process is required prior to the agency "drawing independent conclusions." Unless the agency unilaterally undertakes its own detailed

investigation, it may only perpetuate any errors contained in the original report, even as it draws its own "independent conclusions." In addition, even if the agency has the time, funding, and resources to determine that the evidence contained in the CACI is erroneous or unfounded, it does not have power to expunge the listing.[13] Thus, in the best case scenario for an innocent person placed on the CACI, the only remedy under this avenue for relief is that the agency might still confer the government benefit after taking the time to conduct an added background investigation. The CACI listing, however, remains.

We evaluate the process that California provides persons listed on the CACI under the three part test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews* instructs us to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. *Id.* The procedural due process inquiry is made "case-by-case based on the total circumstances." *California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 711 (9th Cir. 2003). We will consider the private and governmental

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[13] In most instances, California provides no formal means for reviewing or appealing an agency's independent determination. As we discuss in greater detail below, denial of a right by DSS may be subject to judicial review. CAL. HEALTH & SAFETY CODE § 1526; CAL. FAMILY CODE § 8720.

interests first, followed by a discussion of the risk of error in the procedures established by the state.

a. Private Interest

The Humphries' argument in support of their private interest at stake is essentially coextensive with their argument in support of their liberty interest. From all we have said, the Humphries have an interest in not being stigmatized by having their names included in a child abuse database that places a tangible burden on legal rights, if they have not committed the acts underlying the reports that led to their inclusion. Thus, they have an interest in pursuing employment and adoption, seeking to obtain custody of a relative's children, and securing the appropriate licenses for working with children without having to be subject to an additional investigation, delays, and possible denial of a benefit under California law due to an incorrect listing on the CACI.

b. Governmental Interest

There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the CACI, is an effective and responsible means for California to secure its interest. *See Santosky v. Kramer,* 455 U.S. 745, 766 (1982); *People v. Stockton Pregnancy Control Med. Clinic,* 249 Cal. Rptr. 762, 772 (Cal. Ct. App. 1988) (finding the goals of detecting

and preventing child abuse are a "compelling" government interest). Nevertheless, the operative question is not whether California has a significant interest in maintaining CACI – no one doubts that it does – but rather whether California has a significant interest in having a limited process by which an individual can challenge inclusion on the CACI, and to what extent adding additional processes will interfere with the overarching interest in protecting children from abuse.

We do not question, for example, that California has a significant interest in maintaining even "inconclusive" reports, which are reports that are neither "substantiated" nor "unfounded." *See* CAL. PENAL CODE §§ 11165.12, 11169(a). Such reports that only hint at abuse, when coupled with other information, can reveal patterns that might not otherwise be detected and can be useful to law enforcement. But it is equally apparent that California can have no interest in maintaining a system of records that contains incorrect or even false information. First, the effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims. To clarify our point through an extreme example, it is obvious that if one hundred percent of the population were erroneously included in the CACI, it would provide no benefit to California in identifying dangerous individuals. Thus, the more false information included in a listing index such as the CACI, the less

useful it becomes as an effective tool for protecting children from child abuse. In addition, there is a great human cost in California, as elsewhere, to being falsely accused of being a child abuser. These costs are not only borne by the individuals falsely accused, but by their children and extended families, their neighbors and their employers. Indeed, with the same passion that California condemns the child abuser for his atrocious acts, it has an interest in protecting its citizens against such calumny.

California contends that requiring any process beyond what it currently provides will substantially impair the state's ability to protect children because hearings are time-consuming and drain limited resources, resulting in less efficient delivery of primary services such as protecting children. It is true, of course, that giving individuals some additional procedure by which they can challenge their listing on CACI will impose administrative and fiscal burdens on California. However, generally these burdens are precisely the sort of administrative costs that we expect our government to shoulder. The state has not provided any evidence that the process required to sort through claims of an erroneous listing in the CACI is any more burdensome than the process due in any other context.

c. Risk of Erroneous Deprivation

The final, and perhaps most important, *Mathews* factor is the risk of erroneous deprivation and the

probable value of additional procedural safeguards. As we evaluate this factor, we ask "considering the current process, what is the chance the state will make a mistake?" In this case, we ask, "after examining the process by which persons are listed on the CACI, what is the risk of someone being erroneously listed?" In light of the Humphries' allegations – and keeping in mind that we are reviewing a grant of summary judgment in favor of the state – the answer is "quite likely."

Appellees argue that the current procedures present little risk of erroneous deprivation because an agency may transmit a child abuse report only after it "has conducted an active investigation and determined that the report is not unfounded." CAL. PENAL CODE § 11169(a). We are not assuaged. A determination that the report is "not unfounded" is a very low threshold. As we explained above, CANRA defines an "unfounded report" as a report that the investigator determines "to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect." CAL. PENAL CODE § 11165.12(a). Effectively, a determination that a report is "not unfounded" merely means that the investigator could not affirmatively say that the report is "false." This is the reverse of the presumption of innocence in our criminal justice system: the accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable, or accidental. Incomplete or inadequate investigations must be reported for listing on the CACI.

We have no evidence in the record that indicates exactly how many "false positives" reporting agencies receive. *See Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003); *see also Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008) (noting "[t]he problem of unreliable, induced, and even imagined child testimony"). However, given the high stakes in child abuse cases, presumably an agency investigation and child abuse report can be triggered by as little as an anonymous phone call. It is apparent in such a system there is a real danger of prank and spite calls. California should investigate such reports, and it can – and perhaps should – retain records on any reports it cannot determine to be "unfounded." When it retains all reports that are "not unfounded," it assumes a substantial risk that some of its reports are false, even if the investigator cannot prove to his own satisfaction that they are "unfounded." We understand the need for investigators who work off of hunches, disparate patterns, and minute clues to maintain files on unsubstantiated reports of child abuse for their own investigative purposes. But when such reports find their way into the CACI, there is a real risk that people, like the Humphries, will have to explain publicly how their names ended up on the state's child abuse database.

The record is devoid of any systematic study of the error rate in the CACI. We do note that in a 2004 self-study of CANRA, a California task force reported on a pilot program in San Diego County, where "DOJ discovered that approximately 50 percent of CACI

listings originating from [one agency] should be purged because the supporting documentation was no longer maintained at the local level." *Child Abuse and Neglect Reporting Act Task Force Report* 24 (2004). The task force found that "[if] this percentage held true for the entire State it is possible that half of the 800,000 records which DOJ presently maintains in CACI should be purged." *Id.* We will not infer too much from this limited study, except to remark that it confirms our own observations about the low threshold for putting names on the CACI and the tendency to overinclude. As an initial matter then, we conclude that there is a substantial risk that California will deprive innocent persons of their "reputation-plus" by maintaining files on them in the CACI.

Any errors introduced at the time information is posted to the CACI arguably can be corrected. As we have noted, once the information is posted, the CA DOJ must notify the known or suspected child abuser that he has been reported to the CACI. CAL. PENAL CODE § 11169(b). At that point, if the person believes he has been reported in error, he has three options. First, he can try to informally persuade the investigator who reported it in the first place. Second, he can wait until an agency or other entity that is required to consult the CACI receives the information and rely on the agency or other entity's "independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions." *Id.* § 11170(b)(9)(A). Third, once an agency makes an

adverse decision, some persons have a right to appeal the decision in court. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of an adoption denial).

None of these means for correcting erroneous information in the CACI is well designed to do so. We consider each in turn.

1. *Persuading the investigator.* First, attempting to persuade the investigating officer is not a satisfactory way to correct the records. The Humphries received notice that their names had been referred to the CACI. They were not told what information was there – although, given their recent experience, they had a pretty good idea – and were told, "If you believe the report is unfounded ... please address your request to Detective M. Wilson." In other words, the only recourse offered to the Humphries was to try to get the investigator who had made the original determination that their case was "substantiated" to change his mind. Nothing in CANRA instructs Detective Wilson how to deal with the Humphries.[14] He is not required to respond to the Humphries or address their concerns or pleas in any way, he has been given no standard for reevaluating his initial

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[14] Detective Wilson had actually left the department before the Humphries could petition him to revisit his decision. We refer to Detective Wilson in our analysis here as a surrogate for the investigating officer under the statutory scheme to show the limitations in the process afforded by CANRA.

judgment, and no one else other than Detective Wilson is required to respond to the Humphries. If Detective Wilson refuses to reconsider his original evaluation, the Humphries have no statutory recourse elsewhere within the LASD.

The Humphries are in a tough position. They are not the only ones. Under the California scheme, Detective Wilson has been placed in a difficult situation, because he has been asked to revisit his initial judgment. Detective Wilson is, by training and employment, an investigator, not an adjudicator. That is not to say that investigators do not have to make important judgments; they do, but these judgments are subject to review, and Detective Wilson has none of the usual checks and balances to rely on. In the course of a criminal investigation, he may have his work reviewed by a superior within the LASD, or the District Attorney's office may review his judgment to decide whether to file formal charges. However, these reviews are likely to take place before any information is posted to the CACI and would have no effect on any review Wilson would undertake at the Humphries' request.[15] Effectively, Detective Wilson

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[15] This is demonstrated clearly in the Humphries' case. Although the Humphries had been booked on felony torture, the district attorney rejected the attempt to file a felony action against them, and only allowed the case to be filed for misdemeanor consideration. The district attorney then dismissed the remainder of the Humphries' case after learning of Dr. Paz's examinations of S.H.'s entire body with no sign of abuse. Nevertheless, this district court "review" of Detective Wilson's judgment had no affect on the Humphries' CACI listing.

has been tasked with being investigator, prosecutor, judge, and jury with respect to the Humphries' CACI listing. He alone makes the initial judgment to place the Humphries on the CACI, with all of its legal consequences. Moreover, his judgment is apparently unreviewable except by himself. Since CANRA does not provide for formal review of a CACI listing, it also means that there are no standards for an investigator to review his prior decisions. Under such circumstances – where there is no standard, no superior outlet for review, and thus no danger of being overturned – it is unlikely that an investigator will, in effect, reverse himself. Any errors made in the initial referral to the CACI are, therefore, likely to be perpetuated through an informal appeal.

The California system asks too much of its investigators in this situation. The Due Process Clause does not impose the separation of powers on the state or local governments. *See Colo. Gen. Assembly v. Salazar,* 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari); *Whalen v. United States,* 445 U.S. 684, 689 n.4 (1980). But the Due Process Clause may demand a separation of functions. *See, e.g., Withrow v. Larkin,* 421 U.S. 35, 47 (1975). The burden on the Humphries is a heavy one:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as

> adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias of prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. Nevertheless, we think the burden has been met in this case, particularly when we consider the risk of erroneous deprivation in light of the interests of those whose names are placed on the CACI. We do not question the honesty and integrity of officials such as Detective Wilson. We simply believe that in this context, CANRA asks more of a state or local official than is reasonable.

We wish to be clear: We do not adopt the proposition that "agency members who participate in an investigation are disqualified from adjudicating." *Id.* at 52. Such a proposition is belied by the cases and the "incredible variety of administrative mechanisms in this country." *Id.* Rather, we hold that a single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision. The risk of perpetuating any original error is too great.

2. *Reaching an independent agency conclusion.* Appellees also argue that there is little risk of erroneous deprivation because an agency that has consulted the CACI must base its decision regarding the

listed person on its own "independent conclusions." CAL. PENAL CODE § 11170(b)(9)(A). Furthermore, California regulations make it "the responsibility of authorized individuals or entities to obtain and review the underlying investigative report and make their own assessment of the merits of the child abuse report." CAL. CODE REGS. tit. 11, § 902 (2008). The decision maker "shall not act solely upon [CACI] information." *Id.*

First, we note that by the time the decision maker has referenced the CACI and become charged with undertaking an additional investigation, the individual liberty interest in avoiding stigma and alteration of a legal right has already occurred. Of course, the Due Process Clause does not always require the state to offer process to a person prior to the deprivation of a liberty interest, *see Gilbert v. Homar,* 520 U.S. 924, 930 (1997), but we note for purposes of determining the adequacy of the process offered by Appellees – additional investigation of a CACI listing to determine if a person should receive a government benefit – is the very type of liberty interest that an innocent person listed on the CACI seeks to avoid.

Second, even if the agency conducts a thorough investigation, nothing the agency decides affects the CACI listing; that is, even if an agency, conducting its own investigation, decides that the claims against a listed person are unfounded, the agency has no power to correct the CACI listing. The person is stuck in CACI-limbo. Thus, the process proffered by Appellees fails to address the stigma of being listed on the CACI

and resolve the fact that other agencies will still be forced to consult the CACI to confer other benefits under the law.

Disregarding these limitations temporarily, it is not clear to us that an agency, in reality, can or will regularly engage in the process required to determine that charges against an individual are unfounded. As a practical matter, when a person's name appears on the CACI, the agency must take that fact seriously and presume that the person has committed some kind of child abuse, even if there is no record of conviction. For example, before issuing a license for child care, we cannot imagine that an agency would issue the license to a person listed on the CACI – if it considers doing so at all – without undertaking an investigation to disprove whatever evidence existed that caused the person to be listed in the first place. To restate it in CANRA's own terms, the agency must satisfy itself that information that was "not unfounded" is "unfounded." The agency must be prepared to contradict the investigating agency.

The older the evidence, or the more involved the allegations, the more expensive it will be for the agency to disprove the allegations. We are not unfamiliar with the budgetary and time constraints that hamper government agencies. An agency with a limited budget, presented with the choice of thoroughly investigating allegations of child abuse so that it can issue a license, or simply denying the license after a cursory investigation so that it can spend its resources elsewhere, can reasonably be expected to

choose the latter. We do not mean to imply that California agencies will not behave honestly or forthrightly, but we cannot help but observe that such entities bear a substantial burden, embedded in CANRA, to justify issuing a license to a person listed on the CACI. In sum, any agency – and especially agencies that deal with children – are likely to presume the integrity of the information found on the CACI, assume that individuals listed on the CACI actually abused children, and deny the license rather than risk awarding, for example, a child care license to a listed individual.

This case illustrates these problems. The Humphries allege that they have been erroneously placed on the CACI. In order to clear their name from this stigma, they must apply for a legal right or benefit of the state and subject themselves to an additional investigation before that right or benefit will be conferred. If Craig or Wendy Humphries sought a license to care for children, the licensing agency would have to obtain and review the Humphries' 2001 "file prepared by the child protective agency which investigated the child abuse report." CAL. HEALTH AND SAFETY CODE § 1522.1(a). That file contains Detective Wilson's conclusion that the Humphries were "substantiated" child abusers. In order to protect the children that the Humphries will deal with, the agency is going to start with the presumption that it must deny the license unless it finds evidence contrary to Detective Wilson's investigation. So far as we can determine, the Humphries'

file does not include the result of the dependency proceeding (including the finding of "not true"), or information about the dropped criminal charges (including the finding of "factually innocent"). Faced with the cost and time of investigating seven-year old allegations, there is no reason to assume that any agency would attempt to track down this information on its own. In the Humphries' case, the existence of such court records, if they could get them before the licensing agency, might go a long way to rebutting the presumption. Other applicants, however, may not be so fortunate as to have faced formal proceedings and had the proceedings resolved so clearly in their favor. In the case of a person who is accused of child abuse, but never formally charged, the agency would have to reinvestigate the underlying allegations, possibly requiring the examination of witnesses in order to satisfy itself that the original charges were erroneous. In the end, the agency may do what Sergeant Becker did when asked to review Detective Wilson's file. He simply relied on the fact that charges were filed as evidence "that some sort of crime did occur" and refused to give any weight to the fact that the charges were dismissed in court.

3. *Seeking court review.* Finally, Appellees argue that some persons adversely affected by decisions resulting from their listing on the CACI may seek redress in the legal system on a case-by-case basis. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1526 (providing a hearing after the denial of a license); CAL. FAMILY CODE § 8720 (providing for judicial review of

an adoption denial). The administrative review process offers some check on the system. As we know from our own experience, court review of agency decisions can be a cumbersome process. What is most troubling about the states' argument, however, is that even court review cannot solve the problem. Even if an individual is ultimately successful and obtains, for example, a child-care license, the court's favorable disposition has no apparent impact on the individual's listing on the CACI. Thus, the judicial review afforded by the statute faces the same problem as the original agency determination: It cannot end the stigma or the tangible burden on government rights that an individual listed on the CACI faces.

Again, the Humphries' experience is instructive. The Humphries have taken advantage of every procedure available to them, including the California courts. They went to the dependency court, which found that the allegations were "not true" and returned their children to them. They went to the prosecutor, who dropped all the charges against them. They went to the criminal court, which declared them "factually innocent" and sealed their arrest records. None of this had any effect on their CACI listing. They will remain on the CACI until the investigating agency submits corrected information to the system. There is no effective procedure for the Humphries to challenge this listing, and no way for them to be removed from the listing. The Humphries have been given no opportunity to be heard on the CACI listing.

In sum, we are not persuaded that California has provided a sufficient process for ensuring that persons like the Humphries do not suffer the stigma of being labeled child abusers plus the loss of significant state benefits, such as child-care licenses or employment. The processes in place in California do not adequately reduce the risk of error. In *Valmonte,* which we previously discussed, the New York Central Register had far more procedural protections than the CACI – including a hotline for addressing erroneous listings, a formal investigation procedure, and two administrative hearings on expungement – yet the Second Circuit found that there was a high risk of erroneous deprivation. 18 F.3d at 995-97, 1003-04. "The crux of the problem with the procedures," according to the Second Circuit, was that New York's "'some credible evidence' standard results in many individuals being placed on the list who do not belong there." *Id.* at 1004. Again, unlike in California, in New York there *was* a detailed procedure for expungement from the list. *Id.* at 995-97. When the court looked at that procedure, it determined that seventy-five percent of those challenging their inclusion on the list were successful. *Id.* at 1003. This confirmed to the court that the original listing determination was suspect. *Id.* at 1003-04.

Here, we do not have comparable statistical data on the rate of error because California has no expungement procedure. However, California's standard for referring names to the CACI – "not unfounded" – is, if anything, more encompassing than New York's

word formula – "some credible evidence." Additionally, as we previously noted, even California has recognized, in its task force report, that it may have a high error rate on the CACI, perhaps as high as fifty percent. *Child Abuse and Neglect Reporting Act Task Force Report* at 24. We acknowledge that this figure is not necessarily statistically significant, and we will not treat it as such; however, it does serve as a general indication that a large percentage of the individuals listed on the CACI might have a legitimate basis for expungement. If we can learn any lesson from New York's experience, it is that California's CACI has the potential to be overinclusive, and perhaps vastly so. We note that as of 2004, there were an estimated 810,000 suspects on the CACI. *Id.* at 7. We echo the Second Circuit's observation: "[I]t [is] difficult to fathom how such a huge percentage of [Californians] could be included on a list . . . unless there has been a high rate of error in determinations." *Valmonte,* 18 F.3d at 1004. We conclude that there is a substantial risk that individuals will be erroneously listed on the CACI, and that California offers insufficient means for correcting those errors.

d. Balancing

Mathews requires that we consider the risk of error in light of the individuals' interest and the government's interest. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 529 (2004) ("The *Mathews* calculus . . . contemplates a judicious balancing of these concerns. . . ."). In the end, this is not a difficult case. The lack of any meaningful, guaranteed procedural

safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the Humphries' due process rights. Undoubtedly, California has a strong interest in protecting its youngest and most vulnerable residents from abuse, but that interest is not harmed by a system which seeks to clear those falsely accused of child abuse from the state's databases. CANRA creates too great a risk of individuals being placed on the CACI list who do not belong there, and then remaining on the index indefinitely.

Beyond declaring that California's procedural protections are constitutionally inadequate, we do not propose to spell out here precisely what kind of procedure California must create. The state has a great deal of flexibility in fashioning its procedures, and it should have the full range of options open to it. We do not hold that California must necessarily create some hearing prior to listing individuals on CACI. At the very least, however, California must promptly notify a suspected child abuser that his name is on the CACI and provide "some kind of hearing" by which he can challenge his inclusion. *See Goss v. Lopez,* 419 U.S. 565, 578 (1975); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975) (discussing the various forms that a hearing can take). The opportunity to be heard on the allegations ought to be before someone other than the official who initially investigated the allegation and reported the name for inclusion on the CACI, and the standards for retaining a name on the CACI after it has been challenged ought to be carefully spelled out.

Nothing we have said here infringes on the ability of the police, or other agencies, to conduct a full investigation into allegations of child abuse. The need for such investigations – which, we acknowledge, are intrusive and difficult to conduct – is obvious. Nor does anything we have said undermine the ability of appropriate law enforcement agencies to maintain records on such investigations, even if the investigations do not result in formal charges or convictions. Again, we understand the need for law enforcement to rely on hunches and to collect bits and pieces of information to establish a history or pattern that may lead to formal charges in future cases. The mere maintenance of such investigatory files apart from the CACI does not raise concerns under the Due Process Clause. What California has done is not just maintain a central investigatory file, but attach legal consequences to the mere listing in such files. Once California effectively required agencies to consult the CACI before issuing licenses, the CACI ceased to be a mere investigatory tool. The fact of listing on the CACI became, in substance, a judgment against those listed.

B. *Qualified Immunity*

Having decided that the Humphries' Due Process rights under the Fourteenth Amendment were violated, we next consider whether the individual defendants are entitled to qualified immunity. Officials who violate constitutional rights under color of law are entitled to qualified immunity unless "it would be clear to a reasonable officer that his conduct was

unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). Although the district court did not reach the issue of qualified immunity we may do so where it is clear from the record before us. *See Redding v. Safford Unified Sch. Dist. No. 1,* 531 F.3d 1071, 1078, 1087 (9th Cir. 2008) (en banc) (addressing qualified immunity analysis although the district court had found no constitutional violation).

First, Detective Ansberry is entitled to summary judgment in his favor. We have held that "[l]iability under § 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). The Humphries have not presented any evidence that Ansberry was in any way involved in the decision to list the Humphries in the CACI, or to keep them on the CACI.

Next we grant the motion for summary judgment in favor of Sheriff Baca. Under § 1983, a supervisor is only liable for his own acts. Where the constitutional violations were largely committed by subordinates the supervisor is liable only if he participated in or directed the violations. *Id.* There is no evidence that Sheriff Baca had any direct involvement in the decision to list the Humphries on the CACI, or to keep them on the CACI.

We also have no difficulty finding that Detective Wilson is entitled to qualified immunity. We have held that "an officer who acts in reliance on a duly-enacted statute . . . is ordinarily entitled to qualified immunity" which is lost only if it is "so obviously unconstitutional as to require a reasonable officer to

refuse to enforce it." *Grossman v. City of Portland,* 33 F.3d 1200, 1209-10 (9th Cir. 1994). The California system, which denied the Humphries their procedural due process rights was not so obviously unconstitutional as to suggest to Detective Wilson that he ought not abide by CANRA's provisions and report the Humphries for listing on the CACI. A procedural due process analysis that requires a complicated balancing test is sufficiently unpredictable that it was not unreasonable for Detective Wilson to comply with the duly-enacted CANRA provisions. *See Baker v. Racansky,* 887 F.2d 183, 187 (9th Cir. 1989). Therefore, Detective Wilson is entitled to qualified immunity for any damages resulting from the denial of the Humphries' procedural due process rights, and we grant summary judgment in his favor on that claim.

C. *Monell Liability*

Unlike Detective Wilson, the County is not entitled to qualified immunity for acting in good faith reliance on state law. *See Owen v. City of Independence,* 445 U.S. 622, 638 (1980) (finding that there is no qualified immunity for local government). Rather, the County is subject to liability under *Monell v. Department of Social Services*, if a "policy or custom" of the County deprived the Humphries of their constitutional rights. 436 U.S. 658, 694 (1978). The district court did not address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights.

We have held that "[i]n order to avoid summary judgment a plaintiff need only show that there is a question of fact regarding whether there is a city custom or policy that caused a constitutional deprivation." *Wallis v. Spencer,* 202 F.3d 1126, 1136 (9th Cir. 2000). CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the Index. Nothing in CANRA, however, prevented the LASD from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. By failing to do so, LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County summary judgment on this issue.

III. CONCLUSION

For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the County and remand for further proceedings consistent with this opinion. We affirm the district court's grant of summary judgment to Detectives Wilson and Ansbery [sic] and Sheriff Baca on the grounds of qualified immunity.

AFFIRMED in part; REVERSED in part and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 03-697 JVS (MANx)

Date August 22, 2005

Title *Humphries, et al. v. Los Angeles County, et al.*

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings:

(In Chambers) *Order Granting in Part and Denying in Part Defendants' Motions for Summary Judgment* (#'s 66, 68 & 70)

Defendants County of Los Angeles ("County"), Leroy D. Baca ("Baca"), Michael L. Wilson ("Wilson"), Charles T. Ansberry ("Ansberry"), and Bill Lockyer, in his official capacity as Attorney General for the State of California, ("Attorney General") (collectively "Defendants") move this Court for summary judgment or, in the alternative, summary adjudication on all of the claims brought by Craig Arthur Humphries ("Craig") and Wendy Dawn Aborn Humphries ("Wendy") (collectively, "Humphries") on the ground

that there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law. The motions are granted, in part, and denied, in part.

Background

The Humphries' claims arise from a chain of events beginning on March 17, 2001 when Craig's fifteen year-old daughter from a previous marriage, S.H., who had been living with Craig and Wendy, secretly drove from the Humphries' home in Valencia, California to her biological mother's home in South Jordan, Utah. When S.H. arrived in Utah, she reported that the Humphries had been abusing her for several months. Based on these reports and the results of an emergency room physician's examination, the Utah Department of Family Services and the South Jordan Police Department commenced an investigation into S.H.'s allegations.

On March 26, 2001, Wilson, a detective in the Santa Clarita Valley office of the Los Angeles County Sheriff's Department's ("LASD") Family Crimes Bureau, received from the Utah Department of Family Services a faxed copy of the records of S.H.'s March 19, 2001 visit to the Jordan Valley Hospital Emergency Room. Then, on April 10, 2001, Wilson received reports from the South Jordan Police Department and spoke by phone to S.H regarding the allegations of abuse. Later that day, LASD opened a file on the matter and assigned the case to Wilson.

The following day, based on the emergency room report and records, the South Jordan Police Department case narrative, the supplemental report of South Jordan police officer, Sgt. Crist, S.H.'s handwritten statement, and conversations with S.H. and her mother, Wilson sought and obtained probable cause arrest warrants for Craig and Wendy from Commissioner Alan S. Rosenfield.

On April 16, 2001, Wilson and Ansberry arrested and booked Craig and Wendy on a single charge of felony torture under California Penal Code Section 206. While Craig and Wendy were at the Santa Clarita Valley Sheriff's Station ("Station"), a Sheriff's deputy, without a warrant, picked up the Humphries' children, J.A. (then 11) and C.E. (then 17) from their respective schools, brought them to the Station and took them into "protective custody," Custody of J.A. and C.E. was then transferred to the County Department of Children and Family Services ("DCFS"), which placed the children in foster care.

On April 17, 2001, Wilson completed a California Department of Justice ("DOJ") Form SS 8583 identifying the Humphries as "substantiated" child absuers [sic]. LASD sent the Humphries' SS 8583 Form to the DOJ, and the DOJ entered this information into the Child Abuse Central Index ("Index") database. On that day, Wilson also submitted a request that the County petition to have J.A. and C.E. declared dependent children of the juvenile court. The County then filed a juvenile court dependency petition against the Humphries.

The following day, April 18, 2001, a misdemeanor complaint was filed against plaintiffs in the Los Angeles County Municipal Court, Newhall Judicial District. Plaintiffs were released on bail on April 18, 2001. Eight days later, on April 26, 2001, J.A. and C.E. returned to live with their parents.

Legal Standard

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue

of material fact. *See id.* at 322-23. If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

Preliminary Issues

Before reaching the merits of this motion, the Court addresses whether the finding of factual innocence in the § 851.8 Sealing Orders is admissible. According to California Penal Code § 851.8(i), a finding that an arrested is factually innocent "shall not be admissible as evidence in any action." *Id.* Accordingly, the finding that the Humphries are factually innocent is not admissible in this action.

The Court also notes that because the Humphries did not challenge Defendants' failure to seal their records in accordance with the 851.8 sealing orders in their First Amended Complaint ("FAC"), it is not properly before the Court on this motion for summary judgment. The Court, therefore, declines to address this challenge here.[1]

Discussion

In the FAC, the Humphries seek damages and injunctive and declaratory relief pursuant to 42

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[1] While the Humphries' contention that the juvenile court's "Not True" determination is entitled to collateral estoppel effect would appear to have merit, the Court need not address that issue in view of its rulings below.

U.S.C. § 1983 ("Section 1983") to redress the deprivation of rights secured to them by the federal Constitution. The alleged deprivation stems primarily from three events: the arrest and incarceration of Craig and Wendy on felony charges of torture; the initial and continued inclusion of Craig and Wendy in the Index, the child abuse registry maintained and operated by the DOJ; and the seizure of the Humphries' children, J.A. and C.E., and subsequent placement of J.A. and C.E. in temporary protective custody. The Court addresses each of these events in turn.

A. Arrest and Incarceration of Craig and Wendy Humphries on Felony Charges of Torture

The Humphries have asserted claims against the County, Baca, Wilson and Ansberry under Section 1983 on the ground that these defendants violated their Fourth Amendment rights when they arrested the Humphries and took them into custody. These defendants contend that the undisputed facts demonstrate that the evidence possessed by Wilson at the moment the Humphries were arrested was sufficient to establish probable cause for their arrests, and, therefore, they are entitled to judgment as a matter of law. The Court agrees.

To establish a prima facie case under Section 1983, the Humphries must prove two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law;

and, (2) that the conduct deprived them of their rights, privileges or immunities secured under the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988). Because defendants do not dispute that the conduct about which the Humphries complain, the arrest, took place while defendants were acting under color of state law,[2] the only element at issue is the second: whether in arresting the Humphries defendants violated their Fourth Amendment right to be free from unlawful seizures.

i. Probable Cause to Arrest

The County, Baca, Wilson and Ansberry contend that, in light of the evidence that Wilson possessed at the time of the arrest, sufficient probable cause existed to effectuate the Humphries' arrests. Under the Fourth Amendment, "[p]robable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspects] had committed a crime." *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999). When reviewing the existence of probable cause, a court must base its determination on the facts and circumstances known to the officer at the moment of the arrest, *see Brinegar v. United States*, 338 U.S.

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[2] In fact, all defendants concede that they were acting under color of state law at all times relevant to this dispute.

160, 175 (1949), and must "consider the nature and the trustworthiness of [this] evidence." *Beier v. City of Lewinson*, 354 F.3d 1058, 1064 (9th Cir. 2004). Even where the facts are undisputed, the existence of probable cause may only be determined on summary judgment "if no reasonable jury could find the officers did or did not have probable cause to arrest." *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984).

Here, it is undisputed that, at the time he completed Probable Cause Arrest Warrants and Affidavits in Support Thereof, Wilson possessed the emergency room report and records, the South Jordan Police Department Case Narrative, the Supplemental Report of Sgt. Crist, and S.H.'s handwritten statement and that he had spoken by telephone to S.H. and her mother in Utah. (Plaintiff's [Corrected] Statement of Gen. Issues in Opp'n to Wilson/Ansberry Sep. Statement [hereinafter "P's SGI to W/A", ¶ 12.) The parties, however, do dispute whether Wilson was also in possession of photographs of S.H.'s injuries and the videotaped interview of S.H. (*Id.*) Furthermore, the Humphries take issue with the trustworthiness of this evidence and assert that Wilson should have investigated S.H.'s claims further before arresting the Humphries.

The Court finds that, even absent the photographs and the videotaped interview,[3] Wilson possessed sufficient evidence at the time that the Humphries were arrested such that no reasonable jury could find that probable cause was lacking. On their face, the emergency room reports, the police narrative and report, and statements by, S.H. and her mother were such that a prudent person would have concluded that there was a fair probability that the Humphries had committed a crime. *Buckner*, 179 F.3d at 837.

Furthermore, the Court finds that the Humphries have failed to provide evidence that raises a genuine issue of material fact regarding whether Wilson was reasonable to find the evidence from S.H. trustworthy. Besides suggesting that Wilson should have been suspicious of S.H.'s allegations because she had taken the family car without permission and driven to Utah without a license[4] or because her statements were, according to the Humphries, increasingly "embellished", the Humphries can point

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[3] Notably, the Humphries do not contend that the photographs of S.H.'s bruises or the videotaped interview contradict the evidence Wilson possessed at the time of the arrest. Had this evidence proved contradictory, it may have had some significance in the analysis, but in all likelihood not in view of the evidence that Wilson already had.

[4] The Court notes that these facts could actually be read to support S.H.'s allegations: she was so desperate to escape the abuse that she risked driving hours at night alone and without a license.

to no objective reasons why Wilson should have distrusted the evidence upon which he relied to arrest them. The Humphries do not contend that, at the time of the arrest, Wilson had access to Isaac Benjamin Pax, M.D., S.H.'s oncologic surgeon who treated S.H. for skin cancer, nor have they explained (or has the Court found) which portions of S.H.'s handwritten statement contradict the records from S.H.'s emergency room visit. Accordingly, the Court finds that no genuine issue of material fact remains on the question of whether Wilson reasonably relied on the trustworthiness of S.H.'s allegations and, again, that no reasonable jury could find the absence of probable cause.

Finally, the Court finds that, once Wilson had evidence establishing probable cause, he had no duty to investigate further in an attempt to uncover potentially exculpatory evidence. *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003). Accordingly, Wilson's failure to interview Craig, Wendy, J.A., C.E. or any of S.H.'s teachers, friends, etc. does not nullify the probable cause supporting Wilson's arrest of the Humphries.

ii. Reasonableness of Arrest Warrant Applications

In addition to attacking Wilson's arrest on the grounds that probable cause was lacking, the Humphries contend that there are genuine issues of material fact as to whether Wilson's warrant affidavits were recklessly procured. First, the

Humphries contend there is a real dispute as to what Wilson provided or told the magistrate in order to procure the warrants. Second, the Humphries argue that, if Wilson relied on the various reports reiterating S.H.'s allegations, he recklessly disregarded the truth because Wilson should have known that S.H. had reasons to fabricate. Third, the Humphries contend that, in light of the absence of any exigent circumstances, Wilson should have waited to obtain more facts before arresting them.

Each of these arguments lacks merit. First, defendants' failure to produce the particular items attached to the probable cause affidavits does not create a genuine issue of material fact. Rather, on summary judgment, the Humphries have the burden of actually bringing forth evidence to create a genuine issue of fact, Such an issue is not created by simply saying they never had the opportunity to review a particular piece of evidence. Next, as noted above, the Humphries have failed to provide evidence that Wilson possessed any facts that the accounts of the abuse were inherently suspect. Accordingly, no genuine dispute remains on the issue of reckless disregard for the truth. Finally, as discussed above, Wilson was under no obligation to attempt to uncover exculpatory evidence once probable cause for the Humphries' arrest had been established.

Based on the foregoing, the Court finds that Wilson did not recklessly procure the warrant affidavits for the Humphries' arrests. For this reason, and because the Court has found that probable cause

existed for the Humphries' arrests, the Court grants the County's, Baca's, Wilson's and Ansberry's motion for summary judgment on the Humphries' Section 1983 claim insofar as it is based upon alleged violations of their Fourth Amendment rights.

iii. Monell Liability

The Court notes that because it has found no violation of the Humphries' Fourth Amendment rights, it need not address whether the County is liable under *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658, 694 (1978).

iv. Availability of Qualified Immunity for Wilson and Ansberry

Because the Court has found that no Fourth Amendment violations have occurred, the Court need not determine whether Wilson and Ansberry are protected by qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."

v. Liability on the Part of Sheriff Baca

This issue is moot in light of the above ruling granting Defendants summary judgment on the Humphries' Section 1983 claim based on violations of their Fourth Amendment rights.

B. Initial and Continued Inclusion of Craig and Wendy Humphries in the Index

The Humphries have also asserted claims against the County, Baca, Wilson Ansberry and the Attorney General under Section 1983 on the ground that these defendants violated their Fourteenth Amendment rights to procedural and substantive due process by including them in the Index. Defendants argue that summary judgment of these claims is appropriate for several reasons. First, Defendants contend that the Humphries lack standing. Second, Defendants assert that inclusion of the Humphries in the Index does not deprive the Humphries of any constitutionally protected interest. Third, with regard to the procedural due process claim, Defendants argue that, even if listing on the Index deprives the Humphries of a constitutional interest, the procedures attendant to any deprivation were constitutionally sufficient.

i. Standing

Defendants contend that the Humphries lack standing to bring a claim challenging their inclusion in the Index because they have suffered no actual and imminent injury as a result of their inclusion in the Index. Under Article III of the U.S. Constitution, an individual has standing if the individual can demonstrate: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of

the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision," *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Here, the Humphries have alleged several concrete and redressable injuries that they have suffered from inclusion in the Index. Among these are injury to their reputations and damage to their familial relations. The Supreme Court has held that an interest in one's reputation is sufficient to confer Article III standing. *Spencer v. Kemna*, 523 U.S. 1, 24-25 (1998). Likewise, the Court finds that the alleged injury to the Humphries' familial relations confers standing on them to assert a claim for invasion of their right to familial privacy because it is an injury in fact, it is traceable to the Index listing and would be redressed by removal of the Humphries from the Index. Accordingly, the Court finds that the Humphries have standing to bring Section 1983 claims based upon violations of their rights to personal and familial privacy as a result of their inclusion in the Index.

In addition, the Humphries have also alleged a number of harms that they will suffer in the future. For example, the Humphries have expressed an interest in applying for employment or volunteer services at the Florence Crittenton Center, and Wendy has indicated that she intends to seek further

certification from the California Commission on Teacher Credentialing ("CCTC").[5] (Decl. Craig Humphries, ¶ 15; Decl. of Wendy Humphries, ¶¶ 3, 10.) According to the Humphries, they are hesitant to seek such employment or certification because they fear that their Index listings will influence the decision-making process and prevent them from being hired.[6]

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[5] With regard to the teaching credential, the evidence indicates that the CCTC does not have access to the Index. The author of the letter upon which the Humphries rely to support their contention that the CCTC may obtain information from the Index has since explained that his statement that the Community Care Licensing Division will share "information" with the CCTC in this letter refers only to "information" the CCTC is authorized by statute to receive. (Decl. of Peter P. Castillo ISO Lockyer's Reply [hereinafter "Castillo Decl."], ¶ 3; Decl. of Esther Boynton, Exh. D.) Because the CCTC is *not* authorized by the Child Abuse Neglect and Reporting Act ("CANRA") to receive such information, *see* Cal. Penal Code § 11165, *et seq.*, the Community Care Licensing Division would not share this information with the CCTC. (Castillo Decl., ¶ 3.) As a result, it is clear that Wendy cannot and will not be harmed in her pursuit of a teaching credential as a result of being listed on the Index. Accordingly, the "harm" she alleged that she would suffer in connection with seeking a teaching credential from the CCTC cannot serve as the basis for standing.

[6] The Court rejects the argument that Craig's and Wendy's declaration should be stricken under the sham affidavit doctrine. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991). The fact that they have *current* employment and volunteer goals not expressed at deposition is not the type of inconsistency to which the doctrine is addressed, and is perhpas [sic] no inconsistency at all.

The "Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (*en banc*), as long as the risk of harm is "concrete." *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004). The Court finds that the "threatened harm" that the Humphries have identified is sufficiently concrete to endow the Humphries with standing to challenge the Index listing on the ground that it is preventing them from pursuing various employment or other child-care related opportunities.

However, as discussed below, threatened harm sufficient for standing does not necessarily serve as a predicate for relief.

ii. Procedural Due Process

In procedural due process claims, the deprivation of a constitutionally protected interest "is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original). To analyze a procedural due process claim, the Court must first determine whether there exists a constitutionally protected liberty or property interest with which the state has interfered. *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989). If the answer is yes, the second question is whether the procedures attendant on that

intrusion were constitutionally sufficient. *Mathews v. Eldridge*, 424 U.S. 319, 332-335 (1976). Defendants contend that the Humphries cannot satisfy either prong of this analysis and, therefore, summary judgment in their favor is warranted. The Humphries, on the other hand, contend that summary judgment is inappropriate because their listing on the Index has deprived them of several protected interests and rights and the procedures attendant on this deprivation were constitutionally deficient.

a. Protected Liberty Interest

i. Statutorily-Created Interest

On the question of whether the state has interfered with a protected interest, the Humphries first argue that Defendants have violated their entitlement to remain or be taken off the Index unless certain findings are made, a liberty interest they contend was created by the Child Abuse Neglect and Reporting Act ("CANRA"). Indeed, the Supreme Court has held "that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). State-created liberty interests arise when a state imposes "substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). To determine whether a state law contains sufficient limitations, courts must "examine closely the language of the relevant statutes and

regulations." *Thompson*, 490 U.S. at 461. In order to create a liberty interest, this language must contain substantive predicates to govern official decision-making, as well as explicit mandates, "*i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Id.* at 463.

In resolving the question of whether a statute creates a protected liberty interest, the Supreme Court has cautioned that courts must be careful not to confuse substantive rights or interests with the procedure designed to prevent their arbitrary deprivation. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Retaining such a distinction is essential; no liberty interest in mere procedures exists because "[p]rocess is not an end in itself" and "[t]he State may choose to require procedures for reasons other than the protection against deprivation of substantive rights" without establishing a substantive right in those procedures. *Olim*, 461 U.S. at 250-51 ("Elevating a state-mandated procedure to the status of a constitutionally protected liberty or property interest would make process an end in itself rather than a requirement whose constitutional purpose is to protect a substantive interest in which the individual has a claim of entitlement"; citation omitted).

As noted above, the Humphries contend that CANRA has endowed them with a protected liberty interest in not being placed on the Index without an active investigation and a finding that the child abuse

allegations against them are not unfounded, and in being removed from the Index if it is later determined that the allegations are unfounded. The specific statutes that the Humphries cite as the source of this interest are California Penal Code Sections 11169 and 11170. As discussed below, the Court finds that CANRA fits the construct for a state-mandated procedural scheme that dictates a substantive outcome. This finding, however, does not end the inquiry. The Court should also consider whether the statute alleged to be the source of the liberty interest was enacted for the benefit of those asserting the protections of the Due Process Clause and, if so, whether the interest asserted falls within the concept of "liberty."

a. The Mechanics of CANRA

The relevant statutes place substantive limitations on official discretion by mandating certain outcomes if substantive predicates are met. California Penal Code Section 11169 ("Section 11169"), for example, states that an investigating agency, here the LASD, "shall not forward a report to the Department of Justice unless it has conducted an active investigation and determined that a report is not unfounded, as defined in Section 11165.12." Cal. Penal Code § 11169. The substantive predicates in this portion of the statute include an active investigation and a determination that a report is not unfounded, which, according to Section 11165.12,

means that the allegations of child abuse are not false, not inherently improbable and do not merely involve an accidental injury. Cal. Penal Code § 11165.12. If these predicates are not met, i.e. there has not been an active investigation and/or a finding that the report is not unfounded, then under the mandates of Section 11169, the investigating agency must not forward the report to the DOJ.[7]

In addition, Section 11169 requires that, if a report previously deemed not unfounded is subsequently determined to be unfounded, the DOJ must be notified and must not retain the report. Here, the substantive predicate is a determination that the report is unfounded and the mandatory action is notification of the DOJ and removal of the report from the Index.

California Penal Code Section 11170 ("Section 11170") also contains a substantive predicate and mandates action significantly limiting the discretion of the DOJ. Under this statute, the DOJ must not retain (mandatory action) any reports that are determined to be unfounded (substantive predicate).

In addition to the finding that the relevant statutes contain substantive predicates and mandate action, the Court also finds that these statutes are

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[7] Conversely, under Section 11169, if there has been an active investigation and a finding that the report is not unfounded, the investigating agency must forward the report to the DOJ. Cal. Penal Code § 11169.

not merely procedural guidelines for the LASD and the DOJ to follow. As noted above, Sections 11169 and 11170 do not only require an active investigation, which could be classified as a procedure, before someone's name is placed on the Index. Rather these sections, in combination with Section 11165.12, mandate specific substantive outcomes, including whether a name is placed on or removed from the Index, based on certain predicates, which is distinct from statutes that merely authorize or direct particular actions or remedies, *Forrester v. Bass,* 397 F.3d 1047 (8th Cir. 2005). As a result of these mandates and substantive predicates, CANRA may create an "expectation that a particular result will follow from a particular required action," which could constitute an entitlement, as opposed to a merely "expectation that some sort of action will be taken." *Tony L. v. Childers,* 71 F.3d 1182, 1186 (6th Cir. 1995). Accordingly, the Court finds that CANRA is constructed so as to potentially endow Humphries with a substantive entitlement, not merely an expectation that certain procedures will be followed.

In response to the Humphries' argument that Sections 11169 and 11170 create a protected liberty interest, Defendants argue that the statutes cannot create such an interest because they do not sufficiently limit the discretion of the LASD and the DOJ. In support of this contention, Defendants point to the fact that the investigating agencies possess substantial discretion in determining whether a report is unfounded under Section 11165.12.

While under Supreme Court precedent a statute that creates a protected interest must limit official discretion, it need not completely eliminate it. Rather, the Supreme Court has recognized statutorily-created liberty interests even when the decisions regarding the satisfaction of substantive predicates are subjective. *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 12 (1979). In so doing, the Supreme Court distinguished between two distinct uses of the term "discretion." *Board of Pardons v. Allen*, 482 U.S. 369, 375 (1987). "In one sense of the word, an official has discretion when he or she is simply not bound by standards set by the authority in question." *Id.* (internal quotation marks omitted). Such discretion does not create a liberty interest under the statute. In the other sense of the word "discretion", officials "must use judgment in applying the standards set him [or her] by authority." *Id.* (internal quotation marks omitted; brackets in original). This type of discretion "is not incompatible with the existence of a liberty interest" when action is mandated after the agency "determines (in its broad discretion) that the necessary prerequisites exist." *Id.*

It is clear that, under CANRA, the investigating agency does retain discretion in deciding whether or not a report is unfounded. This discretion, however, is of the second, rather than the first, type recognized by the Supreme Court in *Greenholtz* and *Allen*: while the investigating agency does not apply the standards set forth in Section 11165.12 mechanically but, rather, uses judgment in their application, it cannot

simply ignore these standards when determining whether a report is unfounded.

The necessary conditions for finding a liberty interest in CANRA, substantive predicates and mandatory action, are present. However, in light of the remainder of the inquiry, the Court cannot find that an interest warranting procedural due process protections exists.

b. Other Considerations

As noted above, when determining whether a statutorily-created liberty interest exists, a court should also consider whether the statute alleged to be the source of the liberty interest was enacted for the benefit of those asserting the entitlement and, if so, whether the interest asserted falls within the concept of "liberty."

The Court first takes up the question of whether the statute at issue, here CANRA, was enacted for the benefit of the parties seeking the protection of procedural due process, the Humphries. The Supreme Court has stated that, even if a statute mandates action, it does "not necessarily mean that state law gave [a party] an entitlement." *Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796, Slip Op. at 16 (2005). "Making the actions of government employees obligatory can serve legitimate ends other than the conferral of a benefit on a specific class of people." *Id.*;

Olim, 461 U.S. at 250.[8] In *Castle Rock*, the Supreme Court held that a beneficiary of a restraining order did not have an entitlement to enforcement of the order. Among the reasons behind this holding is that the "serving of public rather than private ends is the normal course of the criminal law. . . ." *Id.* Likewise, in *Sandin v. Conner*, 515 U.S. 472, 482 (1995), the Supreme Court found that prison regulations did not create a constitutionally protected liberty interest, in part, because "[s]uch guidelines are not set forth solely to benefit the prisoner."

As in *Castle Rock* and *Sandin*, CANRA and its procedures have not been adopted solely for the individuals in the Index. Indeed, the principal focus of the statute is the protection of children and support to law enforcement agencies who investigate child abuse. The lack of any enunciated intent to also protect individuals who may be placed on the Index cuts strongly against a finding that CANRA creates a liberty interest in remaining off the Index. As the Supreme Court stated in *Castle Rock*: "If [an individual] was given a statutory entitlement, we would expect to see some indication of that in the statute." CANRA lacks such an indication and, as a result, the Court finds that, despite its substantive predicate/

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[8] "The State may choose to require procedures for reasons other than protection against the deprivation of substantive rights, of course, but in making that choice, the State does not create an independent substantive right." (461 U.S. at 250; *footnote deleted*.)

mandatory action construct, CANRA fails to create the liberty interest claimed by the Humphries.

Moreover, the fact that there is a potential conflict between the goal of protecting children and supporting law enforcement agencies in those efforts and the recognition of an individual liberty interest in CANRA's procedures reinforces this conclusion. An individual's interest is always to avoid the Index, and if listed, to get off the Index. Within the parameters of the statute, the goal of protecting children and supporting law enforcement agencies is best served by an expansive application of CANRA's standards for listing. Given CANRA's purpose, it is clear how that conflict should be resolved. In this light, the Legislature's adoption of limitations on listing and continued listing can best be viewed as an effort to ensure that the Index remains a useful and credible tool rather than an intent to create a liberty interest in CANRA's procedures.

Even were this Court to have found that CANRA's sole intent was to benefit individuals like the Humphries, the Court would have reached the same conclusion. The interest that CANRA would create in remaining. or being taken off of the Index simply does not fall within the types of "liberty" interests courts traditionally recognize.

In *Sandin,* the Supreme Court expressed concern that the presence of mandatory duties in a regulatory scheme was not necessarily the appropriate trigger

for finding a liberty interest in those procedures. The court noted:

> [W]e believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Mecham*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. *See also Board of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, *see, e.g., Vitek*, 445 U.S. at 493 (transfer to mental hospital), and *Washington*, 494 U.S. at 221-22, 110 S.Ct. at 1036-37 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

In essence, the Supreme Court looked through the regulations – whether labeled mandatory or not – to assess whether the regulated conduct involved a liberty interest. Concluding that the conduct did not involved [sic] a liberty interest, the Court declined to find a liberty interest in regulations which otherwise

met the substantive standards plus mandatory outcome construct. Only recently, the Supreme Court has affirmed this approach in *Wilkinson v. Austin*, ___ U.S. ___, 2005 U.S. Lexis 4839 at *25-27 (June 13, 2005), in reviewing Ohio's procedures for assigning a prisoner to a so-called "Supermax" facility.

The Ninth Circuit and other courts have generally considered that *Sandin*'s limitation on the recognition of liberty interests is not applicable outside the context of prison regulations. *Carlo v. City of Chino,* 105 F.3d 493, 498-99 (9th Cir. 2000); *accord Rodriguez v. McLoughlin*, 214 F.3d 328, 338 (2d Cir. 2000). Although the present case does not involve prisoner rights, the general holding of *Sandin* remains: Where there is no liberty interest in the subject matter, there is no interest in the accompanying procedures.

In this context, it is significant to note that the Supreme Court has declined to find a liberty interest in having one's name disclosed as a sex offender. In *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1, 6-7 (2003), the Court repeated its holding in *Paul v. Davis,* 424 U.S. 693, (1976), in observing that "the mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." In addition, as the Ninth Circuit recognized in *Russell v. Gregoire,* 124 F.3d 1079 (9th Cir. 1997), the Supreme Court has never affirmatively established a broad right to privacy in information collected in a database. Rather, in the cases cited in *Russell, Nixon v. Administrator* of *General Services,*

433 U.S. 425 (1977) and *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court simply held that, if there is such a right, it was not violated by the provisions at issue.[9]

The import of these cases in light of *Sandin* and *Wilkinson* is that one cannot find a liberty interest in the regulatory scheme where there is no liberty interest affected. The only difference between *Sandin* and the present case is that the Supreme Court made the finding of an absence of a liberty interest in the same c[illegible] Here that finding stems from earlier cases, *Paul, Connecticut Dep't of Public Safety, Whalen* and *Nixon*. The result, however, is the same, and the Court is unable to find that CANRA creates a liberty interest protected under the Due Process Clause.

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[9] In *Whalen*, the Supreme Court upheld a New York statute that created a database of people who used ceratin [sic] prescription drugs. In reaching this result, the Supreme Court "stated that, at most, the collection and use of such information by the government is accompanied only in some circumstances by an arguable constitutional duty to avoid unwarranted disclosures." *Russell*, 124 F.3d at 1093 (*citing Whalen*, 429 U.S. at 598-604). Likewise, in *Nixon*, the Supreme Court noted "*Whalen*'s dicutm [sic] that [o]ne element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters, but concluded that, to the extend [sic] there is such a right, it is not violated if the statute contains safeguards against undue dissemination." *Id.* at 1093-94 (internal citations omitted).

c. Qualified Immunity

Even were this Court to recognize a procedural due process claim via a liberty interest created by CANRA, the Court finds that summary judgment in favor of Wilson and Ansberry[10] would be appropriate on qualified immunity grounds.

When deciding, the question of qualified immunity, the Court must first ask whether the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer is yes, then the Court must determine whether that constitutional right is clearly established. *Id.* This second inquiry, "it is vital to note, must be undertaken in light of the specific context of the case, not as a broad, general proposition." *Id.* Finally, if both questions are answered in the affirmative, the Court must decide whether, under this law, a reasonable officer could have believed that his conduct was lawful. *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997).

Assuming the Court found that CANRA created a liberty interest and, taken in the light most favorable to the Humphries, that Wilson and Ansberry violated this interest, the officers would nevertheless be entitled to the protection of qualified immunity because this liberty interest is not clearly established

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[10] For purposes of the qualified immunity analysis, the Court assumes that Ansberry's participation in the arrest and investigation of the Humphries was sufficient to justify his presence as a defendant to the procedural due process claim.

law. Never has the Supreme Court, the Ninth Circuit, or any other federal court ruled that CANRA creates a liberty interest in remaining off the Index. Accordingly, summary judgment in favor of Wilson and Ansberry would be granted on qualified immunity grounds.

ii. Right to Familial Privacy

Next, the Humphries argue that the Index interferes with their rights to familial privacy. The Supreme Court has long recognized that parents have a constitutionally protected liberty interest in their relationships with their children. *Smith v. Org. of Foster Familes* [sic] *for Equal. & Reform.*, 431 U.S. 816, 845-46 (1977); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Included in this broader right are the more specific rights to make decisions regarding the care, custody, and control of one's children, *Troxel v. Granville*, 530 U.S. 57 (2000), and to direct the education and upbringing of one's children. *Meyer*, 262 U.S. 390; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The right to familial privacy, however, is not without limitation. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). For example, the Fourth Circuit has noted that the "right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir. 1994) (*quoting Watterson v. Page*, 987 F.2d 1, 8 (1st Cir. 1993)).

The Court agrees with Defendants that the Index does not infringe on the Humphries' rights to familial privacy. Despite any discomfort that the Humphries may feel from being on the Index, the listing does not directly implicate their right to make decisions regarding the care, custody, and control of their children or the right to direct their education and upbringing.[11] [12] Accordingly, the Court finds that the Index does not interfere with the Humphries' constitutional rights to familial privacy.[13]

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[11] Nor may this Court take steps to broaden the scope of the right to familial privacy to encompass indexes such as the one at issue here. The Supreme Court has repeatedly cautioned courts against expanding the scope of liberty interests. *See Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (noting that because the "guideposts for responsible decisionmaking" when liberty interests protected by substantive due process are at issue are scarce, courts should be reluctant to expand the scope of these interests).

[12] The Court recognizes that certain government agencies do have access to the Index and may use this information in assessing various child custody decisions. However, in using this information, the inquiring agency must investigate the circumstances surrounding an Index inclusion and make an *independent* decision. Cal. Health & Safety Code § 1596.877; Cal. Penal Code § 11170(b)(8)(A). In addition, the Court finds that adequate procedural safeguards surround this decision. For example, the listed party has an opportunity, upon inquiry by authorized agencies, to refute, rebut and challenge the Index information at that time. Cal. Health & Safety Code §§ 1551, 1596.879. In addition, any decision by the inquiring agency is subject to judicial review. Cal. Gov't Code § 11523.

[13] The Court notes that, in their Opposition, the Humphries relied extensively on *Burt v. County of Orange*, 120 Cal.App.4th

(Continued on following page)

iii. Liberty Interest Under "Stigma-Plus"

In addition, the Humphries contend that they have a liberty interest under the "stigma plus" standard. In *Paul v. Davis,* 424 U.S. at 708-09, the Supreme Court held that procedural due process protections apply when a plaintiff suffers stigma from governmental action accompanied by some additional deprivation of liberty or property. According to the Ninth Circuit, the additional deprivation of liberty or property must be "the result of state action directly affecting the plaintiff's rights or status under the law." *Cooper v. Dupnik,* 924 F.2d 1520, 1533 (9th Cir. 1991).

The Humphries argue that their inclusion in the Index satisfies *Paul*'s stigma-plus requirement. First, the Humphries assert, and the Court agrees, that the Index is unquestionably stigmatizing. Second, the Humphries argue that such listing alters their rights and legal status. In support of this assertion, the Humphries cite the fact that certain governmental entities, including various licensing agencies, will access this information before making decisions on issues such as child care employment. The Humphries also rely on the Second Circuit's decision in *Valmonte v. Bane,* 18 F.3d 992, 999-1003 (2d Cir.

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273 (2004). The Court, however, was not persuaded by its reasoning and, therefore, as it is not controlling precedent, did not apply its principles to this case.

1994) in which the court held that listing on child abuse registries satisfied the "stigma-plus standard."

In *Valmonte,* the plaintiff claimed that New York's child abuse registry violated her procedural due process rights because it constituted an effective bar on her ability to obtain employment in the field of child care. *Id.* at 997-98. In evaluating this claim, the Second Circuit applied *Paul*'s stigma-plus standard. *Id.* at 999. Based on this analysis, the Second Circuit first concluded that automatic dissemination of the plaintiff's inclusion on the registry to potential employers satisfied the stigma prong of this test. *Id.* at 1000. The court then found that because potential employers must consult the list before hiring plaintiff and, if they choose to hire her, must state the reasons in writing to the state, the registry placed a tangible burden on plaintiff's liberty interest in obtaining employment in the child care field sufficient to meet the "plus" prong of this analysis. *Id.* at 1001-02. In reaching this conclusion, the Second Circuit emphasized the presence of both of these requirements. *Id.*

After careful review of this case, the Court finds that, despite the fact that it involved a child abuse registry and dissemination to potential employers, *Valmonte* is distinguishable from the situation here. As noted above, in *Valmonte,* the Second Circuit emphasized that prospective employers were not only required to check the registry before hiring child care employees but, if they chose to hire anyone listed in the registry, were required to explain their reasons in writing. *Id.* at 1001. The repeated emphasis on this

combination of requirements indicates that both were necessary to the Second Circuit's finding that the New York child registry implicated plaintiff's liberty interest in pursuing employment opportunities.

In the statutory scheme governing California's child abuse Index, however, such a combination of requirements is not present. While under CANRA government licensing agencies for employment in the field of child care must run potential employees through the Index before granting such licenses, once the agency learns that a person is listed on the Index, it is free, in fact required, to independently evaluate and investigate the listing. Cal. Penal Code § 11170(b)(8)(A). Moreover, if, after independently evaluating the listing, the licensing agency grants the applicant a license to work in child care, it need not, in writing or otherwise, justify its actions. The absence of this latter burden, upon which the court focused in *Valmonte,* renders the situation here distinguishable from the one in that case, and, on this basis, the Court concludes that the Index does not significantly burden the Humphries' ability to pursue employment in the child care field. As a result, the "plus" portion of the "stigma-plus" analysis is not satisfied here and, therefore, cannot serve as the basis for the Humphries Section 1983 claims.[14]

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[14] Far from being a burden, the requirement that the agency receiving Index information make an independent determination is a protection which ensures that mere listing will not compel an unfavorable decision by the agency.

iv. Right to Informational Privacy

Finally, the Humphries assert that the Index violates their right to informational privacy under the California constitution. However, "a claimed violation of a state constitutional right is not cognizable under § 1983." *Radvansky v. City of Olmsted Falls,* 395 F.3d 291, 314 (6th Cir. 2005). The Humphries, therefore, cannot base their Section 1983 claim upon this state-based right.

iii. Substantive Due Process

The Humphries have also brought a Section 1983 claim based upon an alleged violation of their substantive due process rights under the Fourteenth Amendment from their listing on the Index. Substantive due process safeguards against governmental interference with "life, liberty and property" and other fundamental liberty interests where the infringement is not narrowly tailored to serve a compelling government interest. *Reno v. Flores,* 507 U.S. 292, 301-02 (1993). In order to assert a Section 1983 claim based on a violation of substantive due process, a plaintiff must show that a fundamental right was violated by government action. As noted above, the Humphries have failed to meet their burden to provide evidence sufficient to show that any of their fundamental liberty interests have been violated by inclusion in the Index. The Court, therefore, finds that no genuine issues of material fact remain on the

claim and grants summary judgment in favor of Defendants.

iii. Monell Liability

The Court notes that because it has found no violation of the Humphries' procedural or substantive due process rights due to their listing on the Index, it need not address whether the County is liable under *Monell v. Dep't of Soc. Serv. of City of New York,* 436 U.S. at 694.

iv. Availability of Qualified Immunity for Wilson and Ansberry

Because the Court has found that no procedural or substantive due process violations occurred in connection with the Humphries' listing on the Index, the Court need not determine whether Wilson and Ansberry are protected by qualified immunity.[15] *Saucier v. Katz,* 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.")

v. Liability on the Part of Sheriff Baca

This issue is moot in light of the above ruling granting Defendants summary judgment on the

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[15] *See also* Discussion, Section B.ii.a.i.c., *supra*.

Humphries' Section 1983 claim based on violations of their procedural and substantive due process rights in connection with being listed on the Index.

C. Seizure of the Humphries' Children and Subsequent Placement in Temporary Protective Custory [sic].

The Humphries have also brought claims against the County, Baca, Wilson and Ansberry under Section 1983 on the ground that these defendants violated their substantive and procedural due process rights when they seized their children, J.A. and C.E., and failed to provide them information on their whereabouts.

i. Right to Custody and Care of Children

The Humphries have a constitutionally protected right in the custody and care of their children. The Supreme Court has recognized that the "custody, care and nurture of the child reside first with the parents," and that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). In accordance with this premise, the Ninth Circuit holds that "government officials are required to obtain prior judicial authorization before intruding on a parent's custody of [his or] her child unless they possess information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger of serious bodily

injury,'" *Mabe v. San Bernadino County, Dept. of Social Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001) (*quoting Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)). The officers in this case seized J.A. and C.E. without prior judicial authorization, and thus the seizure was justified only if the officers possessed reasonable cause to believe that the children were in imminent danger.

In defining what constitutes imminent danger, the Second Circuit has stated, if the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization . . . for the child's removal, then the circumstances are not emergent." *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999). The Ninth Circuit adopts a similar approach and has held that the danger to a child is not imminent if a warrant could have been obtained prior to the risk of physical harm. *Mabe*, 237 F.3d at 1108.[16] Furthermore, the Ninth Circuit has required that the child face "an immediate threat of serious physical injury or death" before a warrantless removal is justified. *Wallis*, 202 F.3d at 1138.

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[16] In *Mabe*, the alleged abuse had only occurred at night, yet officers seized the child during the daytime. *Mabe v. San Bernadine County*, 237 F.3d 1101, 1105, 1108 (9th Cir. 2001). In denying a summary judgment motion in favor of the defendants, the court held, "Assuming that [defendant] could obtain a warrant the same day . . . , it is difficult to understand how the further delay of a few hours necessary to obtain a warrant would have put [the child] in imminent danger of serious physical injury." *Id.*

Applying this standard to the case at hand, the jury could reasonably conclude that the potential danger to the children was not so imminent as to justify a warrantless seizure. The Humphries were taken into custody during the morning hours, and the children were picked up from school at 2:00 p.m. (Plaintiff's Evidence in Opp'n to Defendants' Motion for Summary Judgement or For Summary Adjudication: Vol. 1, Exhs. 3, 7, 8.) Just as the interval between day and night was thought sufficient time to obtain a warrant in *Mabe,* so too could a jury find the time interval between the morning apprehension of the Humphries and the afternoon release from school of J.A. and C.E. Furthermore, when taken into custody, the children were at school where they were presumably under adult supervision, and J.A. and C.E. were 11 and 17 years old, respectively, which are relatively capable ages. The feasibility of obtaining a court order, the ages of the children, and their location at school, suffice to establish a material question of fact regarding whether there was reasonable cause to believe that the children faced an immediate threat of serious physical injury or death.

Accordingly, the Humphries have produced enough evidence to create a genuine issue of material fact as to whether the warrantless seizure of their children violated their constitutional rights.

ii. California Welfare and Institutions Code

The Humphries also attempt to base their Section 1983 claim for the seizure of their children on violations of California Welfare and Institutions Code § 300, *et seq.* Such attempt is futile, however, because these statutes provide protections well beyond those guaranteed by the Constitution. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996) ("To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983 offers no redress.") Accordingly, the Court grants Defendants' request for summary judgment on the Humphries' Section 1983 claim for unconstitutional seizure of their children insofar as it is grounded upon violations of sections of the California Welfare and Institutions Code.

iii. Monell Liability

The Court denies summary judgment for the County on the Humphries' Section 1983 claim for the seziure [sic] of J.A. and C.E. If the "execution of a government's policy or custom . . . inflicts the injury [then] the government as an entity is responsible under [Section] 1983," *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). The Ninth Circuit has held that "in order to avoid summary judgment, a plaintiff need only show that there is a question of fact regarding whether there is

a city custom or policy that caused a constitutional deprivation," *Wallis,* 202 F.3d at 1136.

It has already been established that there is a genuine issue of material fact in terms of the constitutional deprivation arising from the warrantless removal of the children. The Humphries' have presented evidence that it was, and is, LASD's custom to take children of arrestees into protective custody without a warrant, no matter why or when the parents were arrested. (P's SGI to W/A, No. 16; Depo. of Wilson, 184:13-185:4, 194:12-15 (Apx., Vol. I)). Thus, despite the County's statement to the contrary (Motion for Summary Judgment, or in the Alternative, Summary Adjudication by Defendants County of Los Angeles and Leroy D. Baca, p. 31), there exists a question of fact regarding whether there is a custom or policy that caused the constitutional deprivation.

Therefore, the Humphries' evidence regarding municipal custom is sufficient to permit them to survive summary judgment on the *Monell* issue, and summary judgment in favor of the County on this issue is denied.

iv. Availability of Qualified Immunity for Wilson and Ansberry

As a threshold matter, this Court eliminates Detective Ansberry from potential liability. According to the Ninth Circuit, "[l]iability under § 1983 arises only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d 1040, 1045 (9th

Cir. 1989) (citing *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979)). The Humphries have presented no evidence that Ansberry was directly involved in the decision to seize J.A. and C.E. At most, Ansberry appears to have been involved in a discussion about what to do with the children, and may have argued against their removal. (P's SGI to W/A, No. 46.) There is no evidence that his conduct resulted in the seizure of the Humphries' children, and therefore Ansberry should not be liable for these potential constitutional violations.

On the other hand, Detective Wilson ultimately made the decision to remove J.A. and C.E. from school, prior to judicial authorization.[17] When an official asserts qualified immunity, this Court applies a two-part analysis: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997) (quoting *Carnell v. Grimm*, 74 F.3d 977, 978 (9th Cir. 1996)).

The first prong of the qualified immunity test is satisfied in this case. A parent's constitutionally protected right to the care and custody of his or her

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[17] The defense admits that "[b]ecause both parents had been taken into custody and there existed a substantial risk that J.A. and C.E. were in danger of abuse or neglect, Detective Wilson dispatched a patrol unit to retrieve J.A. and C.E. from their respective school to deliver them into protective custody." (P's SGI to W/A, No. 16.)

children, which can be deprived only by virtue of judicial authorization or imminent danger to the children, is governing law that is "clearly established." *Ram,* 118 F.3d at 1311; *Mabe,* 237 F.3d at 1107.[18]

The second prong of the qualified immunity analysis also survives the summary judgment motion. The Humphries' have presented evidence that, when Wilson arranged for the removal of J.A. and C.E., he had no evidence that either child had been abused or was in immediate danger, and indeed he "knew nothing of those children at that point." (P's SGI to W/A, No. 16.) Although Wilson's belief that there existed a substantial risk of harm to the children was a legitimate concern, a reasonable jury could conclude that it was unreasonable for Wilson to believe that this rose to the level of imminent danger.

Thus, there exists a question of material fact whether Wilson's conduct was reasonable under clearly established law, and the summary judgment motion in regards to this issue is denied. *See Munger v. City of Glasgow Police Dep't,* 227 F.3d 1082, 1087 (9th Cir. 2000) ("Summary judgment on the basis of qualified immunity is not proper unless the evidence

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[18] In addition, California Welfare and Institutions Code § 305 allows a peace officer to take temporary custody of a minor without a warrant when the minor is in "immediate danger of physical or sexual abuse." This explicit statutory recognition of the imminent danger requirement further supports the assertion that the law is clearly established.

permits only one reasonable conclusion. Where 'conflicting inferences may be drawn from the facts, the case must go to the jury.'") (*quoting LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000)).

v. Liability on the Part of Sheriff Baca

This Court grants the motion for summary judgment in favor of Sheriff Baca. The language of Section 1983 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship." *Monell*, 436 U.S. at 692.[19] Indeed, the Ninth Circuit has held that under Section 1983, a "supervisor is only liable for constitutional violations of his subordinates if the superior participated in or directed the violations." *Taylor*, 880 F.2d at 1045.

Here, the Humphries' have produced no evidence that Sheriff Baca had any direct involvement in the removal of J.A. and C.E. Thus, Sheriff Baca is not liable for the decisions and conduct of his subordinates, and summary judgment in favor of the Sheriff on this issue is appropriate. Furthermore, Sheriff Baca is shielded from liability in his individual capacity by virtue of his lack of direct involvement in the removal of the children.

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[19] The court in *Mabe* interpreted this so as to bar vicarious liability against a social worker's unknowing supervisor. 237 F.3d at 1109. A similar analysis applies to the case at hand.

Conclusion

The Court denies the motions for summary judgment on the Humphries' Section 1983 claim against the County and Wilson based on the seizure of J.A. and C.E. without a warrant. The Court grants summary judgment in favor of the defendants on the remainder of the Humphries' claims.

_____ : _____
Initials of Preparer /s/ KP

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 2 3 2009
OFFICE OF THE CLERK

No. 09-350

In the Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

v.

CRAIG ARTHUR HUMPHRIES AND
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a municipality engaged in an ongoing violation of the Constitution is immune from declaratory and prospective relief in an action under 42 U.S.C. § 1983 in the absence of a determination that the constitutional violation stems from a municipal policy or custom?

2. Whether a determination that a municipality is engaged in an ongoing violation of the Constitution is insufficient to permit an interim award of attorneys' fees under 42 U.S.C. § 1988 without a determination that the constitutional violation stemmed from a municipal policy or custom?

3. Whether a court of appeals' holding that a plaintiff has proven a constitutional violation provides grounds for an interim award of attorneys' under 42 U.S.C. § 1988?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals' order awarding interim attorneys' fees (Pet. App. 1-4) is unreported. The court of appeals' amended opinion addressing respondents' procedural due process claim (Pet. App. 5-72) is reported at 547 F.3d 1170. The court of appeals' original opinion addressing respondents' procedural due process claim and its first amended opinion (Pet. App. 143-209, 73-142) are not reported. The district court's opinion (Pet. App. 210-254) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2009 (Pet. App. 1), and the petition for a writ of certiorari was filed on September 21, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents Craig and Wendy Humphries obtained a ruling by one court that the child abuse allegations asserted against them by petitioner Los Angeles County were "not true," and a ruling by a second court that they were "factually innocent" of the criminal charges based on those allegations. Prior to these two judicial determinations, the Humphries had—on the basis of the false allegations—been listed in the Child Abuse Central Index ("CACI"), California's child abuse registry.

Neither the County, whose sheriff's deputy made the determination to list the Humphries in the CACI, nor the State of California, which maintains the CACI, provides a process for the Humphries to reverse the erroneous listings. Despite the two court

rulings in their favor, the Humphries remain listed in the CACI, which is used by third parties in making licensing, employment and other important decisions respecting the Humphries. The Humphries accordingly brought this action for declaratory and injunctive relief and damages under 42 U.S.C. § 1983.

The court of appeals held that, by failing to provide a procedure for removal of names wrongly included in the CACI, the State and the County violated the Humphries' federal constitutional right to procedural due process, and remanded the case for further proceedings consistent with its opinion. Petitioner does not seek review of that constitutional ruling.

In a subsequent, unpublished order, the court of appeals awarded the Humphries interim attorney's fees under 42 U.S.C. § 1988, based on its determination that the Humphries had prevailed on their claim for declaratory relief. The court directed the State to pay ninety percent of the fee award and the County ten percent.

The questions presented by the County's petition relate solely to this interim award of attorneys' fees. The County argues that the court of appeals' finding of an ongoing violation of the Constitution is insufficient to permit an award of interim fees. It contends that an additional determination—that the County acted pursuant to one of its own policies or customs—is also required.

This case is interlocutory. The district court, in addressing the Humphries' damages claims on remand, will consider whether the procedural due process violation stemmed from a County policy or custom. A positive answer to that question will dis-

pose of the County's claims. If the district court finds no violation of a policy or custom, the County may raise its contentions on review of a final judgment.

Moreover, there is no conflict among the lower courts warranting this Court's attention. And petitioner's argument, if accepted, would preclude any declaratory or injunctive relief for persons injured by a municipality's ongoing violations of the Constitution not also pursuant to a municipal custom or policy—even though such relief *is* available against States in parallel circumstances through official capacity actions under *Ex parte Young*, 209 U.S. 123 (1908). Review by this Court is not warranted.

A. Statutory Background

The California Department of Justice ("DOJ") maintains the CACI, a database of alleged child abuse information submitted to DOJ by agencies throughout California. DOJ has been compiling such information since 1965. See 1965 Cal. Stat. 2970 (formerly codified at Cal. Penal Code Ann. §§ 11110, 11161.5). Since 1988, the CACI's maintenance has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), Cal. Penal Code § 11164 *et seq.*[1]

DOJ derives CACI entries from DOJ-issued forms, filled in and sent to DOJ by local welfare and law enforcement agencies that investigate reports of suspected child abuse or neglect ("submitting agen-

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[1] In 1980, California enacted the Child Abuse Reporting Law, which overhauled provisions for reporting and compiling child abuse information. 1980 Cal. Stat. 3420, codified as amended at Cal. Penal Code § 11165 *et seq.* The statute was renamed the Child Abuse and Neglect Reporting Act as of January 1, 1988. See 1987 Cal. Stat. 5368.

cies"). See Cal. Penal Code §§ 11165.9, 11169(a), 11170(a)(1).[2] DOJ culls information from the submitted forms—including identifying data on named victims and suspects, the type of abuse alleged, the submitting agency investigator's classification of the report, and the submitting agency's file number—and enters it into the CACI. See Cal. Code Regs. tit. 11, §§ 903, 904.

California law mandates that certain agencies consult the CACI and conduct an additional investigation of CACI-listed individuals in deciding whether to grant those individuals certain rights or benefits, including various licenses, jobs and volunteer opportunities, or custody of a child. Pet. App. 14-15; see Cal. Penal Code § 11170(b); Cal. Health & Safety Code §§ 1522.1(a), 1526.8(b)(2), 1596.877(b); see also Cal. Code Regs. tit. 11, § 907(b). Further, CANRA makes CACI data available to a range of other entities, in and out of California, for specified purposes. See App. 13, n. 1; Cal. Penal Code § 11170(e).[3]

CANRA prohibits the submission of information for entry in the CACI unless the submitting agency "has conducted an active investigation and deter-

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[2] Suspected child abuse reports may originate from "mandated reporters," *i.e.*, persons who hold any of the positions specified in Cal. Penal Code § 11165.7 (teachers, social workers, etc.); commercial film processors, *id.* § 11166(e); or "[a]ny other person," *id.* § 11166(g).

[3] CANRA states that such third party recipients of CACI data "are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions" regarding the contents of those files for purposes of "making decisions" regarding employment, licensing, adoption or child placement. Cal. Penal Code §§ 11170(b)(10)(A), 11170.5(b).

mined that the report is not unfounded, as defined in [Cal. Penal Code] Section 11165.12." Cal. Penal Code § 11169(a). Under section 11165.12(a), an "[u]nfounded report" is one "determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as defined in Section 11165.6." Accordingly, a report is *not* unfounded if it has been determined to meet none of these four criteria.

"Not unfounded" is the only classification decision that CANRA expressly requires an investigator to make prior to submitting a report for CACI listing. Cal. Penal Code § 11169(a). However, the statute defines two sub-categories of "not unfounded" reports—"substantiated reports" and "inconclusive reports"—both of which are included in the CACI. Cal. Penal Code § 11169(b), (c).[4] DOJ's reporting forms direct that, before submitting any report for entry in the CACI, an agency investigator must classify the report "substantiated" or "inconclusive" by marking one of those pre-printed options on the reporting form, which determines the record's retention period. Cal. Code Regs. tit. 11, § 903(a).

CANRA provides for purging of "inconclusive or unsubstantiated" reports ten years after entry in the CACI unless DOJ receives another report on the same "suspected child abuser" within that period, in which case DOJ retains the listing for at least ten

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[4] An "inconclusive report" (formerly called an "unsubstantiated report") is one determined "not to be unfounded, but in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred." Cal. Penal Code § 11165.12(c).

more years, measured from the receipt of the more recent report. Cal. Penal Code. § 11170(a)(3). The law does not specify a retention period for reports classified as anything other than "unsubstantiated" or "inconclusive." Under DOJ policy, CACI listings based on reports marked "substantiated," as in this case, are set for permanent retention unless the submitting agency notifies DOJ that the report is "unfounded" or should be reclassified as "inconclusive," or that there is no available investigative file that supports the listing. Apps' 9th Cir. Ex. Rec. ("ER") 307-309, 493.

CANRA provides no procedure for challenging CACI listings. The statute provides that, "[i]f a report has previously been filed which subsequently proves to be unfounded, [DOJ] shall be notified in writing of that fact and shall not retain the report," but it does not specify *who* may notify DOJ or how that determination is to be made. Cal. Penal Code § 11169(a); Pet. App. 16-17. CANRA states that "submitting agencies are responsible for the accuracy, completeness, and retention of the reports[.]" Cal. Penal Code § 11170(a)(2). The court of appeals noted that this and other provisions of CANRA "suggest * * * that the investigator and agency that conducted the investigation are responsible for making, and thus correcting, the determination that a report is unfounded." Pet. App. 17.

The court of appeals also determined that "nothing in the statute prevents a submitting agency from enacting some procedure to allow an individual to challenge their listing or seek to have a determination that a report is 'unfounded.'" *Id.* at 17-18. However, neither the County nor the State has enacted such a procedure. *Id.* at 8, 48-49, 71-72.

B. Factual Background

The court of appeals aptly described the events that led to the filing of this action as respondents' "nightmarish encounter with the CANRA system." Pet. App. 18.

Wendy Humphries, a special education teacher at a public elementary school, and her husband Craig Humphries, an executive with a California company and a volunteer soccer coach and basketball coach, were falsely accused of child abuse by "S.H," Mr. Humphries' then-teenage daughter from a previous marriage.[5] As a result of this accusation, the Humphries were arrested by Detective Michael Wilson of the Los Angeles County Sheriff's Department ("LASD") on April 16, 2001. Pet. App. 19.[6]

That same day, a sheriff's deputy, without a warrant, picked up the Humphries' children "J.A." and "C.E." at their schools and took them into "protective custody," and the County placed the children in foster care, even though both of them "denied any fear

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[5] Petitioner incorrectly asserts that "hospital reports confirm[ed S.H.] * * * had been a victim of 'non-accidental trauma. " Petitioner cites Petitioner's Appendix page 19, at which the court of appeals states, "An emergency room physician diagnosed 'non-accidental trauma, with extremity contusions.'" This diagnosis does not "confirm" S.H. had been someone's "victim."

[6] The Humphries were arrested and booked on the single charge of felony torture under California Penal Code § 206 on April 18, 2001. Pet. App. 19. Two days later, Detective Wilson filed a complaint in the Los Angeles County Superior Court, which instead charged the Humphries with two misdemeanors: corporal injury to a child, Cal. Penal Code § 273d(a), and cruelty to a child by endangering health, Cal. Penal Code § 273a(b). See Pet. App. 20.

of abuse or mistreatment and indicated their desire to return home." Pet. App. 19.

The following day, April 17, Detective Wilson completed a report for submission to the CACI, based on S.H.'s allegations. He named Craig and Wendy Humphries as the "suspects"; identified S.H. as the "victim"; stated the "incident" took place from December 1, 2000, to March 18, 2001; identified LASD's file number; and marked the report "substantiated." Pet. App. 20; ER 241. LASD then forwarded Detective Wilson's report to DOJ, which in turn entered the data into the CACI, thereby listing the Humphries for "substantiated" child abuse. Pet. App. 20.

Detective Wilson filed a misdemeanor complaint against the Humphries in the Los Angeles County Superior Court, again based on S.H.'s allegations. Pet. App. 20; ER 433-34. The County filed a separate petition in the Los Angeles County Superior Court, Juvenile Division, commencing non-criminal proceedings to have C.E. and J.A. declared dependent children of the juvenile court on grounds that their "sibling has been abused or neglected." Pet. App. 23.

After spending ten days in foster care, J.A. and C.E. were returned to the Humphries' custody. Pet. App. 19, 213. Subsequently, on June 12, 2001, the juvenile court adjudicated and dismissed all counts of the dependency petition as "Not True." Pet. App. 23.

The criminal charges against the Humphries were dismissed in August 2001. Pet. App. 21. The prosecutor had learned that, during the timeframe of the alleged abuse claimed by S.H., an oncologist examined S.H.'s entire body on repeated occasions and saw no sign of abuse, contradicting "the basic part of

[S.H.'s] testimony that she was injured during the entire time." *Ibid.*

Prior to the dismissals of the dependency and criminal actions, the Humphries received notice that they were listed in the CACI. The notice "inform[ed] them that if they believed the report was unfounded, and they desired a review, * * * they should address their request to Detective Wilson." Pet. App. 20, 24.

After the dependency and criminal actions were dismissed, the Humphries, through their attorney, contacted LASD's Family Crimes Bureau. They learned Detective Wilson no longer worked there, and that there was no available procedure for them to challenge their CACI listing. Pet. App. 24. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney that, after reviewing the matter, LASD would not reverse its report to the CACI on the Humphries. *Ibid.*

Thereafter, the Humphries sought and obtained orders from the criminal court, finding the Humphries "'factually innocent' of the felony torture charge, and requiring the arrest records pertaining to that charge be sealed and destroyed." Pet. App. 21-22; see Cal. Penal Code § 851.8. In finding factual innocence, the criminal court necessarily determined "that no reasonable cause exists to believe that the [Humphries] committed the offense for which the arrest was made." Pet. App. 22-23.

Even after these orders were issued, however, the State and the County refused to reverse the Humphries' CACI listings, and the Humphries remain listed as "substantiated" child abusers. Pet. App. 24.

C. Proceedings Below

Following the refusal of the County and State to expunge petitioners' names from the CACI, petitioners commenced this action in the District Court for the Central District of California seeking declaratory and injunctive relief and damages for violations of 42 U.S.C. § 1983.[7] The Humphries sought a judicial declaration against the State Attorney General, the County, and the County Sheriff "that CANRA and the County's and State's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records." Pet. App. 28.

The Humphries also requested injunctive relief against all defendants ordering "the County of Los Angeles to notify the [California] DOJ that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD." *Ibid.* They also sought damages against the County, the Sheriff, and two Sheriff's Department detectives for the violations of their constitutional rights. *Id.* at 27-28.

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[7] The First Amended Complaint also included Section 1983 claims related to the Humphries' arrests and the warrantless removal of their children, which were not involved in the appeal below, and five state-law counts that were dismissed by the district court and not appealed. Pet. App. 27-29. The complaint named five defendants: Los Angeles County; California Attorney General Bill Lockyer in his official capacity; and County Sheriff Leroy D. Baca and LASD Detectives Charles T. Ansberry and Detective Michael L. Wilson, each in their individual and official capacities. ER 4-5.

1. *The District Court's Ruling.* The district court granted summary judgment in favor of all defendants on the Section 1983 claims relating to the CACI, on the basis that the Humphries' inclusion in the Index did not violate their federal constitutional rights. Pet. App. 234, 254.[8]

2. *The Court of Appeals' Decision.* The court of appeals unanimously reversed the grant of summary judgment to the County and the State, remanded for further proceedings, and affirmed the grant of summary judgment to the Sheriff and detectives on grounds of qualified immunity.[9] Pet. App. 72.

The court of appeals first concluded that the Humphries have a protected liberty interest under *Paul* v. *Davis*, 424 U.S. 693 (1976). Pet. App. 30-31, 41. Accordingly, it held that both the County and the State violated the Humphries' due process rights "by listing and continuing to list" them in the CACI without a constitutionally sufficient process for challenging the listing, and found CANRA, as applied by the County and the State, constitutionally infirm for the same reason. *Id.* at 29, 67-68.

The court determined that nothing in CANRA "prevented the LASD from creating an independent

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[8] The district court granted defendants summary judgment on the Section 1983 claims related to the Humphries' arrest and incarceration, while denying the County's and one detective's motions for summary judgment on the Section 1983 claim arising from the warrantless seizure of the children. Pet. App. 28.

[9] It is not clear why the court below disposed of the *official*-capacity claims against the individuals on qualified immunity grounds. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 556 n.10 (1985) ("Of course, an official sued in his official capacity may not take advantage of a qualified immunity defense.").

procedure that would allow the Humphries to challenge their listing" in the CACI. *Id.* at 72. The court faulted the County for allowing Detective Wilson to place the Humphries on the CACI "with all of its legal consequences" while "his judgment is apparently unreviewable except by himself." *Id.* at 58. It held "that the State and County procedures used in maintaining the [CACI] were constitutionally insufficient, and thus [CANRA] violates the Humphries' procedural due process rights." *Id.* at 2 (internal quotation marks omitted).

The court of appeals recognized that the district court had no occasion to address whether the County had acted pursuant to a municipal "policy or custom" within the meaning of *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978), and that the issue had not been briefed. It noted that, as the facts had been alleged, "it is possible that the LASD adopted a custom or policy" that violated the Humphries' constitutional rights and remanded to the district court to determine the "County's liability under *Monell*." Pet. App. 72.[10]

3. *The Court of Appeals' Interim Award of Attorneys' Fees.* The court of appeals, in a unanimous unpublished order, subsequently granted respondents' motion for an interim award of attorneys' fees pursuant to 42 U.S.C. § 1988. Pet. App. 1-4.

The court found "that the Humphries have prevailed on their claim for declaratory relief and are

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[10] The panel opinion was twice amended, the second time to clarify the scope of the *Monell* remand. Pet. App. 7, 75-76. The court of appeals denied the petitions of the County and the State for rehearing and rehearing en banc on January 15, 2009, with no judges requesting an en banc vote. *Id.* at 73, 76-77.

thus entitled to an award of attorney's fees" against the County and the State. *Id.* at 2. The court's holding that the State and County procedures violated respondents' due process rights "'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff.'" *Ibid.* (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 111-112 (1992)).

The court rejected the County's argument that it could not be held liable for fees in the absence of a finding that it had acted pursuant to a municipal policy or custom, stating that "it is well established in our circuit that the limitations to liability established in *Monell* do not apply to claims for prospective relief." Pet. App. 4 (citing *Chaloux* v. *Killeen*, 886 F.2d 247, 250 (9th Cir. 1989)).

The State, the court determined, is "responsible for 90% of the fees awarded" because it "craft[ed] the statutory and regulatory provisions that created the CACI and its attendant review procedures." Pet. App. 3. The County is responsible for 10% of the fees awarded because it "fail[ed] to craft its own additional procedural protections" to allow innocent parties to have their names removed from the CACI. *Ibid.*

On October 2, 2009, the special master appointed by the court of appeals to recommend the amount of the fee award recommended a total award of $592,580.92. Report at 19. The County's 10% share is $59,258.09. *Id.* at 20. The County did not object to the master's report and recommendation. 9th Cir. Order (Oct. 2, 2009) at 2.

ARGUMENT

The principal focus of the County's petition is the remarkable proposition that a federal court may not be able to provide any prospective relief against a municipality engaged in an ongoing violation of the federal Constitution—even though such relief is routinely available to stop a State's constitutional violations through the device of an official-capacity action. According to the County, prospective relief is available only when the ongoing violation is the product of a municipal custom or policy.

The court of appeals correctly rejected this contention in its prior decision in *Chaloux* v. *Killeen*, 886 F.2d 247 (9th Cir. 1989). It held that *Monell*'s "policy or custom" liability standard "did not intend to limit the reach of plaintiffs seeking prospective relief under § 1983 against the further exercise of governmental authority under an allegedly unconstitutional state statute." *Id.* at 251. Plaintiffs seeking purely prospective or declaratory relief need not prove a "policy or custom" for relief from unconstitutional conduct.

No court of appeals has squarely rejected the sensible conclusion that the availability of prospective relief does not turn on the *Monell* standard. Indeed, the only court of appeals to disagree with *Chaloux* has left open the possibility that its ruling rested on form rather than substance, pointing out that prospective relief against municipalities could be available in official capacity actions against municipal officers similar to those that may be asserted against state officials.

In this case, moreover, the remand proceedings will address whether the County acted pursuant to a

policy or custom. There is no reason for this Court to address the legal issue at this interlocutory stage.

I. THIS CASE'S INTERLOCUTORY POSTURE MAKES IT AN INAPPROPRIATE VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED.

The interlocutory posture of this case weighs heavily against review by this Court, because the district court on remand will address the *Monell* issue that is the subject of petitioner's argument before this Court.

The court of appeals reversed the district court's dismissal of respondents' complaint and remanded for further proceedings consistent with its opinion. One of the issues to be addressed on remand is whether the County acted pursuant to a "policy or custom" and therefore is liable for damages under this Court's decision in *Monell*. See Pet. App. 72.

If the district court decides that issue in respondents' favor, the County recognizes that it would be liable for attorneys' fees. See Pet. 16. And there is very substantial support for the conclusion that the County here acted pursuant to a custom or policy. As the court of appeals explained, "[n]othing in CANRA * * * prevented the [County] from creating an independent procedure that would allow the Humphries to challenge their listing in the Index. By failing to do so," and instead vesting the review function in the official who conducted the initial investigation, "it is possible that the [County] adopted a custom and policy" violative of the Humphries' constitutional rights. Pet. App. 72. It would be an inefficient use of this Court's limited resources to address a legal question

that may not exist after completion of the proceedings on remand.

On the other hand, if the district court were to find no County policy or custom, and that holding were upheld by the court of appeals, the County could renew its request for review by this Court of the interim award of attorneys' fees by filing a petition for a writ of certiorari with respect to that final judgment.[11] There accordingly is no reason for the Court to address that issue now. See *Va. Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Moreover, the County's liability under the interim fee award is $59,258.09. See page 13, *supra*. The amount of money at stake also weighs against a grant of review at this interlocutory stage of the litigation.[12]

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[11] Petitioner erroneously asserts (Pet. 32 n.5) that a subsequent petition would be untimely, citing *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-213 (1952). That case involves a court of appeals' entry of a second judgment with respect to the same appeal. The Court has long held that legal issues addressed in an earlier appeal may be the subject of a certiorari petition seeking review of the judgment entered in a subsequent appeal from the district court's final judgment in the case. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916).

[12] Furthermore, the fee order has no precedential effect. The Ninth Circuit's local rules establish that unpublished orders—such as the attorney's fees order in this case—carry no precedential weight, except when relevant under the law of the case doctrine or for determining issue or claim preclusion. See 9th Cir. R. 36-3(a).

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS WARRANTING THIS COURT'S ATTENTION.

Petitioner's claimed conflict among the courts of appeals is illusory. There is no court of appeals decision squarely holding that declaratory or injunctive relief is not available against a municipality under Section 1983 without a finding that the municipality's actions are the product of a policy or custom.

To begin with, the Sixth and Seventh Circuit decisions that petitioner cites explicitly *do not decide* this issue. In *Leary* v. *Daechner*, 228 F.3d 729 (6th Cir. 2000), the court "assume[d], *without deciding*, that the prohibition on respondeat superior liability for municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages." *Id.* at 740 n.4 (emphasis added). In *Gernetzke* v. *Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), the court plainly stated that the issue was not presented for consideration, as "plaintiffs do not argue that *Monell* is applicable only to their damages claim." *Id.* at 468.[13]

The Second Circuit case on which petitioner relies is similarly inapposite. *Reynolds* v. *Giuliani*, 506 F.3d 183 (2d Cir. 2007), was a challenge by the State of New York to an injunction entered against state officials for failure to supervise New York City offi-

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[13] Petitioner does not cite a Fifth Circuit case similarly reserving decision on the question. *Nobby Lobby, Inc.* v. *City of Dallas*, 970 F.2d 82, 93 n.12 (5th Cir. 1992) ("Because substantial evidence supports the district court's finding that the officers' conduct in this case was pursuant to a city policy we express no opinion on whether a plaintiff must establish a municipal policy or custom to obtain declaratory relief against a municipality.").

cials in their exercise of delegated responsibilities under state law. The only question in the case was "whether *state* defendants are liable to plaintiffs for the *city* defendants' violations * * *." *Id.* at 189 (emphasis added). Unlike here, the State, not the municipal entity, was the appealing party—and the State did not dispute the city's liability.

Indeed, as the court itself said in *Reynolds*, "*Chaloux* is distinguishable from our case insofar as it dealt with a municipality's liability for state policy * * * rather than a supervisor's responsibility for the actions of subordinates." *Id.* at 191. Any discussion of *Chaloux* and *Monell* in that case, therefore, cannot represent a holding with respect to *municipal* liability.

Next, the cases petitioner cites from the Fourth and Eleventh Circuits are ones in which the issue was not raised by the parties or considered by the courts. In *Church* v. *City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), the Eleventh Circuit considered an interlocutory appeal from a preliminary injunction against the City of Huntsville in favor of homeless plaintiffs. Determining that plaintiffs could not show a substantial likelihood of prevailing on the merits of their claim that a city policy was the force depriving them of their rights, the court vacated the injunction. The plaintiffs' brief assumed without analysis that the *Monell* standard applied.[14] The Eleventh Circuit accordingly had no occasion to address the issue.

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[14] See Brief of Appellees Joe Church, Gregory Jacobs, Michael Dooly and Frank Chisom at 13, *Church* v. *City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) (No. 93-6827) ("This suit[] was brought against the City for actions taken by the city via 'exe-

Greensboro Professional Fire Fighters Association, Local 3157 v. *City of Greensboro*, 64 F.3d 962 (4th Cir. 1995), was an appeal of a grant of summary judgment in favor of the City in an action brought by a firefighter and his union alleging that he had been the victim of retaliation for union activities. The plaintiffs sought both injunctive relief and damages. See *id.* at 964. They did not argue that declaratory and injunctive relief were available under Section 1983 without proof that the defendants acted pursuant to a policy or custom. Rather, they "argued that regardless of whether the City is liable under 42 U.S.C. § 1983," they were entitled to an injunction against prospective acts of harassment under a court's general equitable powers. *Id.* at 967 n.6. *Greensboro* contains no reference to *Chaloux*, and neither do the briefs submitted to the court.[15]

The final court of appeals invoked by petitioner—the First Circuit—has addressed the relevance of a finding of a municipal policy or custom in the context of a claim for prospective relief. But it has indicated that any policy or custom requirement may apply only in actions brought against a municipality itself: such a requirement could be a matter of form rather than substance, because prospective relief may be

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cution of [a] government's policy or custom . . ." [citing *Monell*]. Therefore, under the law, municipal liability will attach.")

[15] See Brief of Appellants Greensboro Professional Fire Fighters Association and Steven B. Zimmerman at 21, *Greensboro Professional Fire Fighters Association, Local 3157* v. *City of Greensboro*, 64 F.3d 962 (4th Cir. 1995) (No. 94-1878) (arguing that "even where monetary relief may be expressly prohibited by constitutional provisions, or the Defendant is not subject to suit for damages under 42 U.S.C. § 1983 because it is not considered a 'person[,'] federal courts still have remedial equity power to issue prospective injunctive relief.").

available through the device of an official-capacity suit against municipal officials.

In *Dirrane* v. *Brookline Police Department*, 315 F.3d 65 (1st Cir. 2002), a police officer sued the Town of Brookline, the town's police department, and individual police officials for alleged whistleblower retaliation. On appeal, the police officer argued that *Monell* does not bar a federal claim for prospective injunctive relief—as opposed to damages—against a municipality, relying on *Chaloux*. The court rejected this argument and indicated its disagreement with *Chaloux*. *Id.* at 71.[16]

The *Dirrane* court, however, went on to discuss the possibility that a plaintiff could obtain prospective relief against a municipality without meeting the *Monell* standard by framing the suit as an action for injunctive relief against local officials in their official capacities, rather than against the municipality itself, under the rationale of *Ex parte Young*. *Id.* at 71-72; see *Ex parte Young*, 209 U.S. 123 (1908); pp. 22-24, *infra*. That discussion suggests that in a future case arising in the First Circuit in which a civil rights plaintiff seeks injunctive relief against a municipality, such relief can be obtained without satisfying *Monell* by framing the action as an officer suit under *Ex parte Young*.[17]

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[16] The court nevertheless went on to find that the police officer had failed to establish the preconditions for any award of equitable relief. *Id.* at 72.

[17] The First Circuit extended *Dirrane*'s disagreement with *Chaloux* without discussion in a later case, *Rivera* v. *Puerto Rico Aqueduct and Sewers Authority*, 331 F.3d 183 (1st Cir. 2003). The court did not consider whether official-capacity Section 1983 suits should be held to a different standard. Hence, the

If the First Circuit sustains such an action, any disagreement between the Ninth Circuit and the First Circuit would become completely academic. See *Monell*, 436 U.S. at 690 n.55. A plaintiff could obtain declaratory relief from a municipality without a *Monell* showing simply by naming a municipal official, not the municipality itself, as the defendant. Any disagreement between the First and Ninth Circuit therefore does not merit this Court's attention.

In sum, petitioner relies upon two circuits that do not even mention *Chaloux*, two that explicitly disavow any position on *Chaloux*, a case in the Second Circuit that does not consider municipal liability, and one circuit that has expressed its disagreement with *Chaloux* while potentially rendering that disagreement academic. Given that no other circuit has squarely considered and rejected *Chaloux* in a case where the issue has been explicitly considered, there is no conflict warranting this Court's attention.[18]

First Circuit remains open to such a possibility in a case that squarely presents it.

[18] Conceding that the "Ninth Circuit has consistently reaffirmed *Chaloux*[]," Pet. 21, petitioner nevertheless suggests that there is controversy in the Ninth Circuit over *Chaloux*. Petitioner incorrectly states that in *Truth* v. *Kent School District*, 542 F.3d 634 (9th Cir. 2008), the "district court urged that *Chaloux* be overruled because it 'rests on shaky grounds.'" Pet. 22. In *Truth*, however, the defendant *school district*, not the district court, argued that *Chaloux* should be overruled. *Truth*, 542 F.3d at 644 ("The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it 'rests on shaky grounds.'"). The Ninth Circuit reaffirmed *Chaloux*, noting that subsequent decisions of this Court had not undermined its validity. *Ibid.*

III. A MUNICIPALITY THAT IS VIOLATING THE CONSTITUTION IS NOT IMMUNE FROM DECLARATORY OR INJUNCTIVE RELIEF WITHOUT A FINDING THAT IT IS ACTING PURSUANT TO A MUNICIPAL POLICY OR CUSTOM.

The legal standard urged by the County would make the availability of relief against a municipality's ongoing violations of the Constitution depend upon whether the challenged action rested upon a municipal policy or custom. There is no basis in the applicable legal principles, or in simple logic, for that limitation on federal courts' power to protect the rights conferred by the federal Constitution.

A. Prospective Relief Is Available Against A State Without A *Monell*-Type Showing, And Municipalities Should Not Be Permitted Greater Leeway To Violate The Constitution.

The court of appeals' holding avoids an illogical asymmetry between local and state governments regarding the availability of prospective relief with respect to ongoing constitutional violations.

Under the Court's *Ex parte Young* doctrine, suits for injunctive relief against state officials for deprivation of Federal Constitutional rights are allowed to go forward without violating the immunity granted to the States by the Eleventh Amendment. See *Ex parte Young*, 209 U.S. 123; see also *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for

prospective relief are not treated as actions against the State.'") (citation omitted).

This doctrine exists even though respect for the States' sovereignty is embedded within the Constitution. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 707 (1999) ("[S]overeign immunity derives * * * from the structure of the original Constitution."); *Printz* v. *United States*, 521 U.S. 898, 919 (1997) ("[The states] retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text * * *.") (citation omitted).

Of course municipalities do not enjoy sovereign immunity. *Will*, 491 U.S. at 71 n.10. Yet petitioner suggests a reading of *Monell* that would allow municipalities to enjoy a greater immunity from injunctive relief than States.

Official-capacity actions for prospective relief are functionally equivalent to actions against the entity employing the named official. *Id.* at 71. Yet because "official-capacity actions for prospective relief are not treated as actions against the State," States are susceptible to claims of deprivation of federal constitutional rights under the *Ex parte Young* fiction that such suits against an official do not impinge on state sovereignty. *Id.* at 71 n.10. An action enjoining a state official in his official capacity from engaging in unconstitutional conduct necessarily binds the State. Petitioner, however, proposes that municipalities and municipal officials should enjoy immunity from such suits unless a plaintiff can show a widespread custom or policy was the depriving force.

An example: Suppose a municipal official denied an interracial couple a marriage license because of their race. Clearly, the officer's conduct violates the

Fourteenth Amendment's prohibition against racial discrimination. See *Loving* v. *Virginia*, 388 U.S. 1 (1967). Under the proposed reading of *Monell*, the municipality could not be held liable for damages *or* injunctive relief unless there was a "policy or custom" against granting marriage licenses to interracial couples. Under *Chaloux*, no such showing is necessary for prospective relief, and a court could grant an injunction ordering the municipality to issue a marriage license to the interracial couple. Under petitioner's theory, in contrast, the court would be powerless to direct the city to issue the license. This simply cannot be the law—and clearly would not be if a State, not a county, were the licensing entity.

Chaloux sensibly withdraws from municipalities (and official-capacity municipal employees) this unintended privilege. *Chaloux*, 886 F.2d at 250 ("We conclude that the [*Monell*] Court did not intend to apply any 'official policy or custom' requirement to foreclose a suit for prospective relief against *a county or its officials* for enforcing allegedly unconstitutional *state* laws.") (emphasis added). Indeed, even *Dirrane*, upon which petitioner relies to establish a conflict, notes the "tension" created by petitioner's suggested interpretation of *Monell*. *Dirrane*, 315 F.3d at 71-72.

At the same time, *Chaloux* also heeds the Court's desire in *Monell* to buffer municipalities from excessive damages liability. *Chaloux* undergirds the *Monell* Court's sensible rejection of *respondeat superior* liability on the part of municipalities, which was intended to guard against damages liability for the unauthorized actions of lone employees. *Monell*, 436 U.S. at 691.

B. *Chaloux*'s Reading of *Monell* is Correct

The court of appeals' interpretation of *Monell* is sensible and prudent. In *Monell*, this Court confronted the question "[w]hether local government officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities[.]" *Monell*, 436 U.S. at 662 (internal quotation marks omitted). Answering in the affirmative, this Court overruled in part *Monroe* v. *Pape*, 365 U.S. 167 (1961), which had exempted municipal corporations from § 1983 suits by interpreting the word "person" in § 1983 to encompass only natural persons. *Monell*, therefore, greatly expanded municipal liability.

Explaining its decision to overturn a recent precedent, the *Monell* Court recognized that *Monroe* was in tension "with the warp and woof of civil rights law." *Monell*, 436 U.S. at 696. Specifically, the Court observed that *Monroe*'s holding had been extended to injunctive suits even though this was inconsistent with a generation of school desegregation cases. *Id.* at 696-697; see also *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) (extending *Monroe* to suits seeking injunctive relief); *Suits against Municipalities for Equitable Relief under Section 1983*, 87 Harv. L. Rev. 252, 257-258 (1973) (explaining that the Court extended *Monroe* to injunctive and declaratory relief suits because of *Monroe*'s flawed reading of § 1983's legislative history). *Monell* expressed concern that immunizing municipalities from suit weakened federal court's powers to grant injunctive and prospective relief to remedy constitutional violations. See *Monell*, 436 U.S. at 696 (noting that several school desegregation decisions "holding school boards liable

in § 1983 actions are inconsistent with *Monroe*, especially as *Monroe*'s immunizing principle was extended to suits for injunctive relief"). Read in this historical context, *Monell* ensured the federal judiciary's role in safeguarding constitutional rights from infringement by municipalities.

The *Monell* Court, however, realized that overturning *Monroe* would make municipalities liable for damages under § 1983, a risk not faced by state defendants due to sovereign immunity. To limit the financial exposure of municipal governments, *Monell* established the now familiar "policy or custom" test for liability. Examining the legislative history, this Court framed the question of liability around the concept of responsibility, concluding that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S. at 691. Clearly, however, the animating concern behind *Monell*'s "policy or custom" test is a desire to shield the public fisc from suits alleging that rogue employees violated a person's constitutional rights.

Monell explicitly limited its holding in another respect. This Court concluded by "express[ing] no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity." *Id.* at 701. Following *Monell*, this Court has applied the "policy or custom" test only in damages cases. See *City of St. Louis* v. *Prapotnik*, 485 U.S. 112 (1988); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986).

Given this backdrop, there is little reason to extend *Monell*'s holding to suits seeking prospective relief. *Monell* sought to protect citizens' constitutional rights by allowing suits against municipalities while

simultaneously limiting the financial liability of counties and cities by requiring a showing of a "policy or custom" for damages awards. *Monell*'s concern with damages awards "is notably absent when the relief sought is an injunction halting the enforcement of an unconscionable state statutory scheme." *Chaloux*, 886 F.2d at 251.

IV. THE QUESTIONS PRESENTED REGARDING THE COURT OF APPEALS' DETERMINATION THAT RESPONDENTS ARE PREVAILING PARTIES DO NOT WARRANT REVIEW.

Petitioner does not even contend that there is a conflict among the lower courts with respect to the second and third questions presented in the petition—regarding whether respondents qualify as prevailing parties entitled to an interim award of attorneys' fees pursuant to 42 U.S.C. § 1988.

The claim that respondents do not qualify as prevailing parties in the absence of a determination that the County acted pursuant to a custom or policy simply recasts the first question presented. Certainly nothing in Section 1988 independently imposes a custom or policy requirement.

The claim that the court of appeals' finding of a constitutional violation is insufficient to qualify respondents as prevailing parties is meritless. That ruling—as to which the County has not sought review—plainly obliges the County to cease its ongoing violation of the federal Constitution by providing respondents with the procedural protections that the Constitution requires. The court of appeals correctly determined that its "holding 'materially alters the legal relationship between the parties by modifying

the defendants' behavior in a way that directly benefits the plaintiff.'" Pet. App. 2 (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992)).

The court of appeals held that "a single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision." Pet. App. 60. By virtue of the court's holding, the County must provide an alternative mechanism for reviewing the CACI listings.

Surely the County is not contending that entry of an injunction is required in order to require it to comply with the court of appeals' ruling. Cf. *Steffel* v. *Thompson*, 415 U.S. 452, 469 (1974) (discussing prior decisions in which the Court had declined to enter injunctions against unconstitutional state laws "anticipating that [the Court's rulings] would be given effect by state authorities"); see also *Hanrahan* v. *Hampton*, 446 U.S. 754, 757 (1980) (approving practice of awarding § 1988 fees once one party "had established the liability of the opposing party, although final remedial orders had not been entered").

In *Texas State Teachers Association* v. *Garland Independent School District*, the Court held that "a judgment vindicating the First Amendment Rights of public employees in the workplace * * * materially altered the school district's policy limiting the rights of teachers to communicate with each other * * *." 489 U.S. 782, 793 (1989). It was the finding of a constitutional violation itself that "materially altered" the relationship between the parties.

The County's reliance on *Hewitt* v. *Helms*, 482 U.S. 775 (1987), and *Rhodes* v. *Stewart*, 488 U.S. 1

(1988), is entirely misplaced. In both of those cases the plaintiffs could not receive any prospective benefit from the favorable legal rulings. In *Hewitt*, the plaintiff had been released from prison and in *Rhodes* one plaintiff had been released from prison and the other had died. Therefore, as the County itself recognizes, the plaintiffs, "could not in fact obtain redress from any changes in prison policy caused by their lawsuit." Pet. 42.

Here, by contrast, respondents' names remain in the CACI. Respondents accordingly *will* benefit from the County's cessation of its continuing failure to provide respondents with the process required by the Constitution.

This case presents no issue regarding the Humphries' status as prevailing parties that warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

(3)

No. 09-350

Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

CRAIG ARTHUR HUMPHRIES and
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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SUMMARY

• Respondents concede that the Ninth Circuit's decision that respondents are prevailing parties on a declaratory relief claim without having to satisfy the basic requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is final, immediately enforceable, and not subject to further review by the Ninth Circuit. This Court has recognized that interim fee orders, premised upon erroneous determinations of prevailing party status are properly reviewed by certiorari. *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (*per curiam*). Judicial efficiency is ill served by allowing the issue to remain open for years on end especially when the Ninth Circuit has repeatedly stated that it will not apply *Monell* to claims for prospective relief unless and until this Court specifically addresses the issue.

• *Monell* expressly states that its requirements apply to claims for "monetary, *declaratory*, or *injunctive* relief...." 436 U.S. at 690 (emphasis added). The Ninth Circuit's departure from *Monell*'s plain holding must be halted. Even assuming, arguendo, the extraordinary proposition that *Monell* does not mean what it says, and such claims are not subject to its strictures, the only outcome consistent with judicial efficiency and logic, would be to grant review in order to clarify the Court's view.

• There is an explicit, acknowledged conflict among the appellate courts. Two circuits have expressly declined to follow the Ninth Circuit's

erroneous reasoning. Two other circuits, based upon *Monell*'s plain language, have applied its requirements to claims for declaratory and prospective injunctive relief. Two circuits have expressly acknowledged the conflict, without needing to resolve it.

- The Ninth Circuit here has done precisely what this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988) said it could not do – ex post facto transformed resolution of a legal issue into the equivalent of declaratory relief solely for purposes of conferring prevailing party status on plaintiffs, even though petitioner's underlying responsibility for any violation remains to be determined.

I. THE NINTH CIRCUIT'S DEPARTURE FROM *MONELL* AND RESULTING CIRCUIT SPLIT WARRANT IMMEDIATE REVIEW.

Respondents do not suggest that the Ninth Circuit's order declaring plaintiffs to be prevailing parties is subject to further review by that court. They instead contend that petitioner could await remand and trial in the underlying action, and then following any subsequent appeal and decision by the Ninth Circuit on other issues, seek certiorari on this interim fee order. (Brief for Respondents in Opposition ("BRO") 15-16.) Yet, basic principles of judicial efficiency, economics and fairness make it clear that this case is ripe for review at this time and that

petitioner need not and should not pursue some theoretical and tortuous path to review.

The issues will not be clarified by further proceedings. This is an interim award of fees – plaintiffs' entitlement to these fees will not be revisited by the Ninth Circuit and they are subject to immediate payment. (Reply Appendix) This Court has recognized that review is appropriate in these circumstances. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), the Seventh Circuit reversed a directed verdict for the defendants in the plaintiffs' civil rights suit, remanded for a new trial and awarded plaintiffs attorney's fees. *Id.* at 755. Even though matters remained for trial, this Court nonetheless granted certiorari and held that the plaintiffs were not prevailing parties for purposes of a fee award. *Id.* at 756. Procedurally, this case is virtually identical to *Hanrahan*.

This Court reviews interlocutory rulings that are clearly erroneous and have immediate consequences for the petitioning party. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (declining to "ignore the error in the Court of Appeals' judgment" vacating and remanding the district court's decision to deny a preliminary injunction where the Ninth Circuit's ruling "is clearly erroneous under our precedents" and "has produced immediate consequences for Montana ... ").

The Ninth Circuit's improper rule has caused, and will continue to cause, error and confusion on a widespread basis in the district courts. *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989) is routinely applied by lower courts within the Ninth Circuit and has spawned uncertainty in other district courts. (Petition for Writ of Certiorari ("Pet. Cert.") 30-31 n.4.) There is no indication that the Ninth Circuit is inclined to revisit *Chaloux*. Even in the face of internal discord on the issue it has repeatedly reaffirmed that it will follow *Chaloux* unless and until this Court expressly addresses the issue. (Pet. Cert. 31-32.) Nothing justifies allowing the Ninth Circuit to continue on this erroneous path for years to come.

This issue directly affects municipalities on a recurring basis and demands resolution earlier rather than later. Local public entities face claims for prospective relief under section 1983 on a regular basis. Municipalities are often charged with enforcing state law in the first instance and hence, targets for claims for injunctive relief barring enforcement of unconstitutional statutes. Similarly, prospective relief, notably reinstatement, is routinely at issue in public employment litigation. Respondents do not and cannot dispute the ubiquitous nature of such claims against municipalities. Because this issue is "important and appears likely to recur in § 1983 litigation against municipalities," review is appropriate. *City of Newport v. Fact Concerts, Inc.*, 453 U.S.

247, 257 (1981); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (plurality).

II. THE NINTH CIRCUIT'S DEPARTURE FROM THE CLEAR LANGUAGE OF *MONELL* AND RESULTING CIRCUIT SPLIT REQUIRE REVIEW BY THIS COURT.

A. *Monell* Expressly Applies To Claims For Declaratory And Injunctive Relief And The Court Has Repeatedly Reaffirmed The Custom, Policy Or Practice Requirement.

Monell expressly states that its strictures apply to claims for "monetary, *declaratory*, or *injunctive* relief...." 436 U.S. at 690 (emphasis added).

Following *Monell,* this Court repeatedly stressed that the custom, policy or practice requirement is a rule of causation compelled by the statutory language. (Pet. Cert. 18-19.) As the Court explained in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986), *Monell* was based on

> the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."

In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality) the Court emphasized that "[r]eading the statute's language in the light of its legislative history, the [*Monell*] Court found that vicarious liability would be incompatible with the causation requirement set out on the face of § 1983" and "[t]hat conclusion ... has been repeatedly reaffirmed."

Respondents cite no decision of this Court suggesting that the definition of what it means to "cause" an individual to be "subjected" to a violation of civil rights varies depending upon the nature of the relief sought. Thus, *Chaloux* and its progeny, including the Ninth Circuit's order here, are flatly contrary to the express language of *Monell* and section 1983 itself, as well as the uniform authority of this Court.

B. Prospective Relief Imposes Substantial Financial Burdens On Municipalities, Thus Eliminating *Chaloux*'s Justification For Departing From *Monell*.

Respondents repeat *Chaloux*'s narrow reinterpretation of *Monell* as being concerned solely with avoiding imposition of financial liability on municipalities based upon respondeat superior. (BRO 25-27.) As noted in the petition and above, this interpretation ignores the Court's clear reliance on the language of section 1983 as barring respondeat superior liability.

Respondents do not dispute that prospective relief can and does impose significant financial burdens

on municipalities. Creating a regulatory scheme, correcting internal procedures, or in employment cases, reinstatement of an employee, all carry significant financial costs. These fiscal burdens undermine the very rationale of *Chaloux*. Failure to apply *Monell*'s basic principles to claims for prospective relief requires local public entities to bear substantial costs, including claims for attorney's fees, even in the absence of any evidence that the particular violation was the result of a custom, policy or practice. This result is contrary to the basic principles of *Monell*.

C. Application Of The *Monell* Requirements Allows Prospective Relief Where A Constitutional Violation Is Fairly Attributable To The Actions Of A Municipality And Does Not Afford "Less" Protection Than Is Available Against The States.

Respondents assert that "[t]he legal standard urged by the County would make the availability of relief against a municipality's ongoing violations of the Constitution depend upon whether the challenged action rested upon a municipal policy or custom." (BRO 22.) This implies that there can somehow be unredressed "ongoing constitutional violations" where a plaintiff cannot prove a custom, policy or practice. Not so. Cases involving "ongoing" constitutional violations represent the quintessential *Monell* claim. *Praprotnik*, 485 U.S. at 130 ("a series of decisions by a subordinate official manifested a 'custom or usage'

of which the supervisor must have been aware"); *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (where police officers "so often violate constitutional rights" that need for training is obvious, municipality may be liable for inaction of policymakers).

Respondents do not explain how application of the *Monell* requirements would bar redress in an appropriate case. They posit the hypothetical of a local official refusing to grant a marriage license to an interracial couple. (BRO 23-24.) Under such circumstances, the couple could obtain injunctive relief against the individual official in his personal capacity, requiring him to issue the license. Respondents do not explain why this would not provide appropriate redress. And, if a low-level official declined to issue a license and it is brought to the attention of a policymaking official or an individual to whom such authority has been delegated, failure to issue a license upon a renewed request would amply meet the requirements of *Monell*. *Pembaur*, 475 U.S. at 480, 483; *Praprotnik*, 485 U.S. at 127, 130.

Respondents contend that applying *Monell* to claims for prospective relief somehow provides litigants with less protection than is available against the states under the Eleventh Amendment. But respondents are arguing apples and oranges. The case does not present, and the Court need not resolve, issues surrounding the availability of prospective relief against state officials sued in their official capacity.

Nonetheless, the premise of respondents' argument – that prospective relief is available against state officials without establishing action fairly attributable to the state equivalent to those factors imposing *Monell* liability on municipalities – is dubious. This Court's Eleventh Amendment jurisprudence has made it clear that injunctive relief against state officials is limited to those situations where it is necessary to stop enforcement of an unconstitutional statute and avoid ongoing violations of federal law. *Ex parte Young*, 209 U.S. 123, 155-56, 159 (1908) (state attorney general may be sued for prospective relief to bar enforcement of unconstitutional statute and avoid continuing violation of federal law); *Green v. Mansour*, 474 U.S. 64, 67-69, 73 (1985) (discussing *Ex parte Young* and its progeny, and finding declaratory judgment against state officials improper because "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction").

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court invoked *Monell* in explaining the differences between suing a state official in a personal, as opposed to official, capacity:

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. [Citation.] More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the

> entity itself is a "'moving force'" behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell*, *supra*, at 694); thus, in an official-capacity suit, the entity's 'policy or custom' must have played a part in the violation of federal law. *Id.* at 166 (parallel citations omitted) (original emphasis).

Hafer v. Melo, 502 U.S. 21, 25 (1991) reaffirmed *Graham*: "Suits against state officials in their official capacity ... should be treated as suits against the State" and "[b]ecause the real party in interest in an official capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law.'"

Indeed, a case that respondents cite and discuss – *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007) – rejected claims for prospective injunctive relief against *state officials* because plaintiffs failed to satisfy *Monell*'s requirements of a policy, custom or practice attributable to the state as causing plaintiffs' injuries.

Monell allows full redress for constitutional injuries in appropriate circumstances and there is no justification for the Ninth Circuit's departure from its plain holding.

D. There Is An Acknowledged Conflict Among The Circuits On Whether *Monell* Applies To Claims For Prospective Relief.

Two circuit courts have expressly rejected *Chaloux*'s holding that *Monell* does not apply to claims for declaratory or prospective injunction relief. Despite respondents' rhetorical hair-splitting, the conflict is manifest. In *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002), the court expressly rejected *Chaloux*'s reasoning, noting that it was "on its face at odds with *Monell* itself." Respondents seek to minimize *Dirrane*'s clear conflict with *Chaloux*, by asserting that the First Circuit suggested that prospective relief could be sought against a local public official as opposed to a local public entity without satisfying *Monell*'s requirements. (BRO 20, citing *Dirrane*, 315 F.3d at 71-72.) But the *Dirrane* court noted, "*Monell* says that a suit against an officer in his official capacity is 'only another way of pleading an action against an entity of which an officer is an agent.'" 315 F.3d at 71, citing *Monell*, 436 U.S. at 690 n.55. *Dirrane* does not suggest that a plaintiff can circumvent *Monell* simply by bringing claims for prospective relief against County officials in their official capacity. *Dirrane* clearly involves a claim for prospective relief against a local public entity, and the First Circuit expressly rejected *Chaloux*'s reasoning that such claims are not subject to *Monell*.

In *Reynolds*, 506 F.3d 183, 191, the Second Circuit expressly rejected *Chaloux*. Respondents assert there is no real conflict because *Reynolds* involved a claim for prospective relief against state officials based upon their failure to supervise county officials, as opposed to a claim against a local public entity. The distinction is illusory. Nothing suggests that the Second Circuit, having found that failure to satisfy *Monell* forecloses a claim for prospective injunctive relief against state officials would, nonetheless, allow claims for prospective relief against a municipality under the same circumstances when, of course, *Monell* directly addresses the liability of local public entities. As the *Reynold*'s court explained in expressly rejecting *Chaloux*: "*Monell* draws no distinction between injunctive and other forms of relief and, by its own terms, requires attribution of misconduct to a municipal policy or custom in suits seeking monetary, declaratory or injunctive relief." 506 F.3d at 191.

Two other circuits have expressly held that *Monell* applies to claims for declaratory or prospective injunctive relief without addressing *Chaloux*. *See Greensboro Prof'l Firefighters Assoc., Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995) and *Church v. City of Huntsville*, 30 F.3d 1332, 1342, 1347 (11th Cir. 1994). Respondents assert that the plaintiffs in those cases did not cite *Chaloux*. (BRO 18-19.) But in *Greensboro*, the plaintiffs contended they were entitled to prospective relief even if they could not establish municipal liability under *Monell*,

and the court expressly rejected the argument. 64 F.3d at 967 n.6. *Church* relies on the plain language of *Monell* and its progeny in applying the *Monell* requirements to claims for prospective relief. 30 F.3d at 1342-47.

Two other circuits have recognized *Chaloux*'s clear departure from *Monell* but found it unnecessary to reach the issue. (*See* Pet. Cert. 29, citing *Leary v. Daeschner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001), cert. denied, 535 U.S. 1017 (2002).) Their recognition of the conflict underscores the need for this Court to provide guidance on this significant and recurring issue.

III. THE NINTH CIRCUIT'S DEPARTURE FROM *HEWITT* AND *RHODES* REQUIRES REVIEW BY THIS COURT.

The Ninth Circuit's order ex post facto declaring its prior opinion to be the equivalent of declaratory relief in favor of plaintiffs represents a blatant departure from the commands of this Court in *Hewitt v. Helms* and *Rhodes v. Stewart* and warrants review. *Horn v. Banks*, 536 U.S. 266, 267 (2002) (*per curiam* reversal where "Court of Appeals directly contravened" decision of the Court).

The Ninth Circuit has departed from the basic principle of *Hewitt* and *Rhodes* that an appellate court cannot transform resolution of a legal issue into the equivalent of declaratory relief where, at the end

of the day the relationship between the parties is not substantially altered in that the defendant is ultimately not liable for the alleged conduct. Contrary to respondents' assertion (BRO 29), *Hewitt* did not turn on whether the plaintiff would benefit from injunctive relief because he was no longer a prisoner. Rather, the problem in *Hewitt* was that while the Circuit court had held the defendants violated the plaintiff's civil rights, that declaration was essentially a nullity given that on remand defendants established qualified immunity. *See* 482 U.S. at 758-59, 761-63. As the Court recognized in *Hewitt*, divorcing a declaratory judgment from a finding of ultimate liability in the case erodes the basic rules for establishing such liability. *Id.* at 763.

If no County policy, custom or practice caused a deprivation of plaintiffs' civil rights for the very reason that it was the State and not the County that was ultimately responsible for the statutory scheme, a declaration to the effect that the County is somehow responsible is virtually a nullity and nothing more than a predicate for awarding attorney's fees. This Court's decisions in *Hewitt and Rhodes* foreclose such a result.

CONCLUSION

Petitioner urges that the petition for certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRAIG ARTHUR HUMPHRIES; WENDY DAWN ABORN HUMPHRIES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LEROY BACA, individually and in his official capacity as Los Angeles County Sheriff; MICHAEL L. WILSON, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; CHARLES T. ANSBERRY, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; BILL LOCKYER, Attorney General, in his official capacity as Attorney General of the State of California,

Defendants-Appellees.

No. 05-56467

D.C. No. CV-03-00697-JVS Central District of California, Santa Ana

ORDER

(Filed Dec. 2, 2009)

Before: BYBEE and M. SMITH, Circuit Judges, and MILLS*, District Judge

No. 05-56467

On October 2, 2009, the Appellate Commissioner filed a report and recommendation regarding appellants Craig and Wendy Humphries's motion for attorneys' fees and expenses. An accompanying order permitted the parties to file objections within 21 days. To date, no objections have been filed.

The Appellate Commissioner's report and recommendation is adopted in full. Accordingly, attorneys' fees of $590,950.00 and expenses of $1,630.92, for a total of $592,580.92, are awarded in favor of appellants Craig and Wendy Humphries and against appellees Bill Lockyer, in his official capacity as Attorney General of the State of California ("the State"), and the County of Los Angeles ("the County"). The State shall pay appellants $533,322.83 and the County shall pay appellants $59,258.09.

This order sent to the district court shall amend this court's mandate.

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* The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
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No. 09-350

In The Supreme Court of the United States

LOS ANGELES COUNTY, CALIFORNIA,

Petitioner,

vs.

CRAIG ARTHUR HUMPHRIES and
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Are claims for declaratory relief against a local public entity subject to the requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity or are such claims exempt from *Monell*'s requirement?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is to be reviewed are:

- Craig Arthur Humphries and Wendy Dawn Aborn Humphries, plaintiffs, appellants below, and respondents here.
- Los Angeles County, defendant, appellee below, and petitioner here.
- Bill Lockyer, Attorney General, in his official capacity as Attorney General of the State of California, defendant, appellee below, and nominal respondent here, no appearance having been made on his behalf in this court.

In addition Leroy Baca, Michael Wilson, and Charles T. Ansberry were defendants in the underlying action, appellees in the proceedings below, but not parties to the fee order that is the subject of this proceeding.

There are no corporations involved in this proceeding.

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The order of the United States Court of Appeals for the Ninth Circuit that is the subject of this proceeding was not reported and is found in the Appendix to the Petition For Writ Of Certiorari ("App.") at pages 1-4. The court's subsequent order setting an amount of attorney's fees was not reported and is in the Appendix to the Reply To Brief In Opposition ("Rep. App.") at pages 1-2. The Ninth Circuit's initial opinion in the underlying appeal was published at 547 F.3d 1117 (9th Cir. 2008), but was subsequently withdrawn from the official bound volume and can be found in the Appendix at pages 143-209. The Ninth Circuit's order of January 15, 2009 amending opinion and order denying appellee County of Los Angeles' petition for rehearing and rehearing en banc, denying appellee Bill Lockyer's petition for rehearing and rehearing en banc, granting appellants' motion for clarification, and in part, appellants' petition for rehearing or reconsideration and amended opinion is not published in the official reports and is found in the Appendix at pages 73-142. The Ninth Circuit's second order amending opinion and amended opinion of January 30, 2009 is published in the official reports at 554 F.3d 1170 (9th Cir. 2009) and is found in the Appendix at pages 5-72.

The decision of the district court, granting in part and denying in part, defendants' motions for summary

judgment was not reported, and is found in the Appendix at pages 210-54.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on November 5, 2008. (App. 143.) Petitioner and each of the respondents filed petitions for rehearing. On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of petitioner Los Angeles County and respondent Bill Lockyer, and granting in part plaintiffs' petition for rehearing as well as plaintiffs' motion for clarification and issued its amended opinion. (App. 73.) After petitioner filed a motion to correct a misstatement in the amended opinion, on January 30, 2009, the Ninth Circuit issued its second order amending the opinion as well as an amended opinion. (App. 5-72.) Following respondent Humphries' motion for attorney's fees on appeal and the filing of opposition by petitioner Los Angeles County and respondent Bill Lockyer, on June 22, 2009, the Ninth Circuit issued its order finding plaintiffs to be prevailing parties for purposes of an attorney fee award, directing that any fees be split 90%-10% between the State and the County, and remanding to the Appellate Commissioner for a report and recommendation concerning only the amount of fees. (App. 1-4.) On September 20, 2009, Los Angeles County timely filed a Petition for Writ of Certiorari in this court and

jurisdiction is proper in this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents pursuant to 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The June 22, 2009 order of the Ninth Circuit was made pursuant to 42 U.S.C. § 1988(b) which provides as follows:

> In any action or proceeding to enforce a provision of §§ 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681, et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] or § 1983 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, such officer shall not be held liable for any costs including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The respondents allege that petitioner Los Angeles County, as well as respondent State of California, through its then Attorney General Bill Lockyer, violated their rights under the Fourteenth Amendment to the United States Constitution, the relevant part of which reads as follows:

> ***Fourteenth Amendment (Section I):***
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

A. The California Child Abuse Index.

This case arises from respondents having been placed on the California Child Abuse Index (the "CACI"), a centralized database of reported child abusers maintained by the State of California as required by the Child Abuse and Neglect Reporting Act (California Penal Code § 11164 *et seq.*, "CANRA").

Under CANRA, when a child protective agency such as the Los Angeles County Sheriff's Department receives a report of child abuse, it must conduct an "active investigation." California Penal Code §§ 11165.9, 11169. If the agency determines the allegations are "not unfounded," it must submit a § 11169 report to the California Department of Justice, which maintains an index of such reports. California Penal Code §§ 11169, 11170(a). Allegations of child abuse are "not unfounded" if the investigating agency determines they are not "false" or "inherently improbable" and do not "involve an accidental injury" or "constitute child abuse." California Penal Code § 11165.12(a). A report

of alleged child abuse may be "substantiated," meaning (under the statutory definition in effect when the Los Angeles County defendants submitted the § 11169 report on plaintiffs) the agency has determined it is "based upon some credible evidence;" or it may be "inconclusive," meaning the agency has determined it is not unfounded but "there is insufficient evidence to determine whether child abuse . . . occurred." California Penal Code section 11165.12(b) & (c) (1990) (amended and rewritten by Stats. 2000, ch. 16).

If a previously filed report later proves to be unfounded, the California Department of Justice must be notified and may not retain it. California Penal Code section 11169(a). Otherwise, the report is removed from the index after ten years, provided the Department of Justice receives no further child abuse reports regarding the listed person. California Penal Code section 11170(a)(3).

B. Allegations And Subsequent Investigations Of Child Abuse Lead To The Humphries Being Listed In The CACI.

In July 2000, S.H., a minor, came to California to live with plaintiffs, her father and stepmother; she

had previously lived with her mother in Utah. (ER 5.)[1]

S.H. asserted that plaintiffs began abusing her around December 2000. (ER 144; SER 7.) For example, S.H. stated plaintiffs would "quiz" her on her studies and, when her answers were unacceptable, would yell epithets at her and hit her, often with a book or cooking utensil; she also reported they would force her to study in her underwear or to jog in place in her underwear while they hit her and sprayed her with water. (ER 144-48; SER 7-18.)

On March 18, 2001, S.H., then 15, took plaintiffs' car and drove to her mother's home in South Jordan, Utah, where she reported the abuse. (ER 148, 144; SER 17-20.) An emergency room physician diagnosed her with non-accidental trauma, noting "multiple linear and circular contusions" on her extremities, which appeared to have been incurred over a period of time. (ER 144-45; SER 6-8.) A South Jordan police officer photographed bruises on S.H.'s arms and legs, some of which appeared to have been caused by a stick or other long, skinny object, and one of which looked like a large handprint. (ER 145; SER 13.)

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[1] The district court docket (included in appellants Humphries' Excerpts of Record in the Ninth Circuit at 832-55) is cited as "TR" followed by docket number. The Excerpts of Record is cited as "ER," and the County defendants' Supplemental Excerpts of Record as "SER."

On March 26, 2001, Wilson, a detective with the Los Angeles County Sheriff's Department, received a report of the alleged abuse from the Utah Department of Human Services, Division of Child and Family Services. (ER 143-44.) He contacted the South Jordan Police Department and requested assistance in interviewing S.H. (ER 145.) On April 3, 2001, the South Jordan Police Department conducted a videotaped interview of S.H., and she wrote a statement detailing her abuse. (ER 145-46; SER 15, 17-20.)

On April 10, 2001, Wilson received the South Jordan Police Department's report, the videotaped interview of S.H., and her statement. (ER 145.) Wilson also discussed the allegations with S.H. and her mother by telephone. (ER 148-49.)

Based on S.H.'s written statement, the videotaped interview of S.H., the reports from the South Jordan Police Department and Utah Department of Family Services, the emergency room report detailing S.H.'s injuries, photographs of the injuries, and statements by S.H. and her mother in the telephone conversations, Wilson obtained a warrant to arrest plaintiffs for violations of section 273a(a) (Cruelty to Child) and section 206 (Torture). (ER 149; SER 22-26, 28-32.)

On April 16, 2001, Wilson, accompanied by Ansberry, arrested plaintiffs. (ER 149.) Plaintiffs were booked only for felony torture under section 206. (ER 203, 210, 255-56.) Ansberry interviewed Respondent Wendy Humphries. (ER 151; SER 60-62.) Respondent Craig

Humphries refused to talk to the detectives. (ER 151; SER 82-83, 45-46.)

The same day, plaintiffs' two remaining minor children were taken into protective custody and placed in foster care. (SER 74-81, 100-01.) Both children were interviewed and confirmed various aspects of S.H.'s allegations. (ER 150-51.)

On April 17, 2001, as required by California Penal Code section 11169, Wilson submitted a report of child abuse to the California Department of Justice (the "§ 11169 report"), so plaintiffs' names could be entered into the Index database of known or suspected child abusers. The form indicated the charges against plaintiffs were "substantiated." (ER 241, 469-70; SER 34, 88-89.)

On April 18, 2001, Wilson filed a misdemeanor complaint in the Los Angeles County Superior Court, charging plaintiffs with corporal injury to a child under section 273d(a) and cruelty to a child by endangering health under section 273a(b). (ER 433-34.) These charges were later dismissed "in the interests of justice." (ER 792, 436, 562-63, 566-69; *see also* SER 116.) The felony torture charges on which the Humphries had been booked were also dismissed. (ER 262-63.) The Humphries then successfully petitioned the court under California Penal Code section 851.8 for orders finding them "factually innocent" of the felony torture charges, and requiring the arrest records pertaining to that charge sealed and destroyed (the "sealing orders"). (ER 262-63.) The sealing orders did

not apply to the misdemeanor charges. (ER 262-63, 792-94, 802; *see also* SER 115-16.)

On April 19, 2001, the County filed a dependency petition against plaintiffs in the Los Angeles County Superior Court, juvenile division ("juvenile court"). (ER 159-70.) The juvenile court's order adjudicating the dependency petition stated the petition's allegations were "not true." (ER 427-31.)

Subsequently, the Humphries' attorney contacted Sheriff's Department Sergeant Michael Becker and informed him of the criminal court's sealing orders and "factual innocence" finding and the juvenile court's "not true" finding. Becker reviewed plaintiffs' case, obtaining additional information about the sealing orders and the juvenile court's finding, and ultimately, he concluded the findings and additional information did not warrant notifying the Department of Justice that plaintiffs should be removed from the Index. (*See* SER 178-79, 191-92, 194, 112.) In response to a California Department of Justice questionnaire in October 2003, the Sheriff's Department confirmed it was maintaining investigation records and that the § 11169 report was still substantiated. (ER 576-77.)

C. Plaintiffs File Suit Against The State Attorney General And The County.

The Humphries initially filed a federal complaint on August 27, 2002 (TR 1) with the operative first amended complaint ("complaint"), filed on January 14,

2003, naming as defendants the County of Los Angeles, Sheriff Baca, detectives Wilson and Ansberry, and California Attorney General Bill Lockyer. (TR 13; ER 1.)

The complaint alleged claims under 42 U.S.C. § 1983 and state law based on three categories of events: (1) plaintiffs' inclusion in the Index, (2) their arrests for child abuse, and (3) the temporary removal of their children from their custody. (ER 2-28.) The district court dismissed the state claims without leave to amend. (ER 88-89, 95-96.) Under § 1983, the remaining claims sought, *inter alia*, damages based on the allegedly improper submission of a child abuse investigation report to the California Department of Justice and the subsequent failure to notify the Department of Justice that the report was unfounded, an injunction to compel the County defendants to notify the Department of Justice that the report was unfounded, and a judicial declaration that CANRA and the County's Index-related policies are unconstitutional because they do not provide procedures by which individuals such as plaintiffs may reverse their Index listings. (ER 18-19, 24, 28.)

On November 15, 2004, the County defendants moved for summary judgment. (TR 66-69.) With respect to plaintiffs' Index-related *Monell* claims, the County asserted that plaintiffs could not establish the merits of their underlying Due Process claim. (TR 66 at 13-28.) Plaintiffs opposed. (TR 93-101, 105-110.) The district court granted summary judgment to defendants on all of plaintiffs' Index-related claims and

on their claims regarding their arrests for child abuse, but denied it as to the claims for removal of their children. (ER 723-47; App. 210-54.) Because the district court found no violation of plaintiffs' substantive or procedural due process right arising from their listing on the Index, it concluded it need not decide whether the County would otherwise be liable under *Monell*. (App. 245.)

On September 21, 2005, plaintiffs appealed from the portions of the district court's order granting summary judgment on their Index-related claims. (ER 717-18.)

D. The Appeal.

Plaintiffs appealed the district court's dismissal of their due process claims for injunctive, declaratory and damages relief stemming from inclusion in the CACI. On November 5, 2008, the Ninth Circuit issued an opinion reversing the judgment as to the County and the State. (App. 143.) The court found that CANRA and the CACI did not afford due process with respect to allowing those listed in the database to be removed once charges had been determined to be unfounded. (App. 205-06.) As to the County, the court observed that unlike the individual defendants, it was not entitled to qualified immunity. (App. 208.) The court acknowledged the County could only be subject to liability under *Monell*, if a policy or custom deprived the Humphries of their constitutional rights. (*Id.*) The court noted that the district court "did not

address the County's liability under *Monell* because it found no violation of the Humphries' constitutional rights." (*Id.*) It then stated that in order to avoid summary judgment, a plaintiff need only show there was a question of fact regarding whether a city, custom or policy caused a constitutional violation. (App. 209.) The court then noted that while CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing in the Index, nothing in CANRA "prevented the LASD (Los Angeles County Sheriff's Department) from creating an independent procedure that would allow the Humphries to challenge their listing on the Index" and therefore "LASD's custom and policy violated the Humphries' constitutional rights. Therefore, we deny the County's summary judgment on this issue." (*Id.*)

The County of Los Angeles petitioned for rehearing, arguing that the question of whether the actions of its Sheriff's Department personnel with respect to the CACI was the result of a policy, custom, or practice fairly attributable to the County under *Monell* had not been litigated in the motion for summary judgment or on appeal. Summary judgment had been granted solely on the basis that there was no constitutional violation in the first instance. (App. 244-45.) The County observed that under California authorities, it was not free to alter the State's statutory scheme governing inclusion or removal from the CACI, and hence, at the very least, the question whether the County could be held responsible for any constitutional violation under *Monell* was an open

question yet to be litigated. The other parties filed petitions for rehearing as well.

On January 15, 2009, the Ninth Circuit issued an order amending the opinion and denying the petitions for rehearing of the County and the State and granting in part plaintiffs' petition for rehearing and motion for clarification. (App. 73.) The court repeated its conclusion that "CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing" on the CACI, and that nothing in CANRA prevented the County Sheriff's Department "from creating an independent procedure that would allow the Humphries to challenge their listing on the Index." (App. 142.) It stated that "[b]y failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal – and because the issue was not briefed by the parties – we remand to the district court to determine whether or not the County is entitled to *qualified immunity*." (*Id.*; emphasis added.)

Since the opinion previously noted that the County as a public entity was not entitled to invoke "qualified immunity," the County filed a request for the court to correct what appeared to be an error in the opinion. The County suggested that the court had inadvertently substituted the phrase "qualified immunity" for "*Monell*" liability and submitted proposed language to correct the mistake.

On January 30, 2009, the court issued a second order amending the opinion as well as an amended opinion. (App. 5, 7.) As to the County's *Monell* liability, the court repeated its earlier conclusion that it was possible that the County Sheriff's Department had adopted a custom and policy that violated the Humphries' constitutional rights and remanded "to the district court to determine the County's liability under *Monell*." (App. 72.) In the disposition of the case, the court stated: "For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion." (*Id.*)[2]

E. The Ninth Circuit Determines Plaintiffs Are Prevailing Parties For Purposes Of A Fee Award.

Plaintiffs filed a motion for attorney's fees on appeal, arguing that they were prevailing parties given the court's determination that the State statutory scheme under CANRA and the CACI violated their rights to due process, and that the County did not create additional procedural protections in order to

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[2] The court, as it did in its prior opinions, affirmed the grant of summary judgment to the individual defendants based on qualified immunity. (App. 72.)

prevent their constitutional injury. Plaintiffs sought $652,000 as Lodestar attorney's fees and a 2.0 multiplier.

The County opposed the motion for attorney's fees, arguing, among other grounds, that plaintiffs had not prevailed as against the County in that as the opinion recognized, plaintiffs still had to prove that the constitutional violation at issue was the result of a policy, custom, or practice attributable to the County under *Monell*. The County also noted that plaintiffs had not sought or obtained summary judgment with respect to their claims for declaratory relief and that in fact no judgment for declaratory relief existed. Rather, the court had simply remanded to the district court for further proceedings consistent with the opinion.

On June 22, 2009, the Ninth Circuit issued its order determining that plaintiffs were prevailing parties for purposes of a fee award as against both the State and the County. (App. 1-4.) Citing earlier Ninth Circuit authority, the court held that neither a formal order nor judgment for declaratory relief was necessary for purposes of a fee award. (App. 2.) It concluded that its opinion finding "that the State and County procedures used in maintaining" the Index were "constitutionally insufficient" and "violate[d] the Humphries' procedural due process rights" "'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff,'" so as to justify a fee award. (*Id.*)

The court also found that based upon its earlier decisions in *Chaloux v. Killeen*, 886 F.2d 247, 250 (9th Cir. 1989) and *Truth v. Kent School District*, 542 F.3d 634, 644 (9th Cir. 2008), the "limitations to liability established in *Monell* do not apply to claims for prospective relief." (App. 4.) Hence, plaintiffs' failure to establish the County's *Monell* liability did not impact whether plaintiffs were prevailing parties for purposes of a fee award. (*Id.*) The court concluded, however, that because of the County's relatively minor role in the procedural scheme, it would only be liable for 10% of any attorney's fees. (App. 3.) The court directed the Appellate Commissioner to issue a report and recommendation solely concerning the amount of reasonable fees. (App. 4.)

On December 2, 2009 the court issued an order adopting the October 2, 2009 report and recommendation of the Appellate Commissioner regarding the amount of fees. (Rep. App. 1-2.) It awarded the Humphries a total of $590,950 in fees and $1,630.92 in costs, with the State of California, through its Attorney General to pay $533,322.83 of that amount, and Los Angeles County to pay $59,258.09. (*Ibid.*)

SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this court expressly held that municipalities "can be sued directly under § 1983 for monetary, *declaratory*, or injunctive relief where, as here,

the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690, emphasis added. Despite this clear language, in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), the Ninth Circuit, alone among the federal appellate courts, expressly declined to follow *Monell* and held that claims for declaratory and prospective injunctive relief are not subject to *Monell*'s policy, custom, or practice requirement.[3] The result is that in this case, the respondents have been declared prevailing parties for purposes of an award of attorney's fees on appeal based upon the Ninth Circuit's determination that its opinion declaring a state law and county procedures unconstitutional *ex post facto* constituted declaratory relief as against the County. The Ninth Circuit did so even though it acknowledged that the question of whether the County inflicted any constitutional injury on the plaintiffs by virtue of a policy, custom, or practice remained at issue. (App. 2-3.)

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[3] Two circuits have expressly declined to follow *Chaloux*, holding that it is flatly inconsistent with the plain language of *Monell*. *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002); *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007). Two other circuits, without reference to *Chaloux*, have found that *Monell* governs claims for prospective relief. *Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332, 1342-47 (11th Cir. 1994).

Chaloux's limitation of the *Monell* causation factors to claims for damages does not withstand scrutiny. It is contrary to this Court's interpretation of the language and legislative history of § 1983 and undermines the basic principles of federalism that underlie the policy, custom, or practice causation requirement.

First, contrary to *Chaloux*'s assertion, *Monell*'s rejection of *respondeat superior* liability was not premised on the view that Congress had attempted to alleviate financial burdens on municipalities. Rather, congressional concern in the form of rejection of the Sherman amendment, focused on setting a limit on the sorts of obligations that the federal government could impose on municipalities by exposing them to damage claims. *Monell*, 436 U.S. at 694-95. Congress did not believe it could impose an obligation on municipalities to enforce laws that they were not otherwise empowered to enforce under state law and balked at holding them accountable for the acts of others. However, where municipalities were authorized to enforce the law, it could require that those laws be enforced in a manner consistent with the Constitution. Yet, that control over the actions of municipalities was limited to those circumstances where the entity itself inflicted the constitutional injury. The statutory language limiting liability to those who "subject or cause another to subject" the plaintiff to a constitutional violation necessarily repudiated *respondeat superior* as a basis for invoking the remedies of § 1983, which included both damages and equitable relief.

Second, following *Monell*, the court has repeatedly reaffirmed that the policy, custom, or practice requirement is a rule of causation going to core principles of federalism by limiting the circumstances in which federal power through § 1983 may invade the internal operations of municipalities. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997). While the court has announced this rule in the context of cases concerning claims for damages, these causation requirements and concerns of federalism apply with equal, indeed arguably even greater force with respect to claims for declaratory and prospective relief against municipalities. As the *Monell* court observed, damage claims act indirectly to compel particular actions by municipalities through deterring particular types of conduct. Yet, declaratory and prospective relief act directly upon public entities, with courts undertaking to review and declare the adequacy or inadequacy of particular actions or procedures. It is illogical to impose a higher standard of causation, i.e., proof of a policy, custom, or practice for purposes indirectly controlling municipalities through potential damage claims, while applying a lesser standard to more direct judicial intervention via declaratory or prospective injunctive relief.

Third, allowing claims for declaratory relief to proceed on a lesser standard of causation than applicable to claims for damages, leads to inconsistent and illogical results. For example, here, the Ninth Circuit has declared the County's procedures with

respect to the CACI to be violative of due process, without specifically identifying the particular procedures, and more importantly, acknowledging that it is an open question whether in fact these procedures constitute a policy, custom, or practice fairly attributable to the County under *Monell*. The result is that the County could prevail on liability based upon the absence of any unconstitutional procedure fairly attributable to the County yet, in contradictory fashion, be determined to have maintained an unconstitutional policy for purposes of declaratory relief. Moreover, in allocating attorney's fees 90%-10% between the State and the County, the Ninth Circuit necessarily made some determination of fault, albeit completely untethered to any standard for assessing liability enunciated by this Court.

Fourth, contrary to *Chaloux*'s reasoning, application of the *Monell* requirements to a claim for declaratory or prospective relief is consistent with the manner in which this Court has treated official capacity claims against state officials under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). *Chaloux* asserts that when an unconstitutional state law is left solely to municipal officials to enforce, then *Ex Parte Young* allows declaratory relief without attempting to show that the statute in question was attributable to a policy, custom, or practice of the municipality. But *Chaloux*'s reasoning is particularly inapt here, where the State Attorney General responsible for enforcing the state law in question and indeed, in maintaining the Index, is a party to the

action. Moreover, *Chaloux*'s misreading of this Court's decision is even more fundamental. This Court has repeatedly invoked *Monell* in the context of official capacity suits against state officials noting that "the entity's 'policy or custom' must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Nothing in this Court's Eleventh Amendment jurisprudence supports abandonment of *Monell*'s policy, custom, and practice requirement with respect to claims against municipalities for declaratory relief.

As this Court has made plain in *Monell*, and in the long line of decisions following it, the policy, custom, or practice requirement is a rule of causation defining the limits of federal power. Unless a plaintiff establishes constitutional liability under that standard, no remedy, whether it be damages, injunctive or declaratory relief, is appropriate.

ARGUMENT

MONELL CORRECTLY CONCLUDED THAT ALL CLAIMS FOR RELIEF AGAINST A MUNICIPALITY UNDER § 1983, INCLUDING CLAIMS FOR DECLARATORY RELIEF ARE SUBJECT TO THE REQUIREMENT THAT THE PLAINTIFF PROVE THAT THE CONSTITUTIONAL INJURY WAS INFLICTED AS A RESULT OF A POLICY, CUSTOM, OR PRACTICE OF THE MUNICIPALITY.

In finding respondents to be prevailing parties as against the County for purposes of a fee award on appeal, the Ninth Circuit concluded that its opinion reversing summary judgment for the County and the State of California was tantamount to a grant of declaratory relief. (App. 2.) Although the County had opposed the fee motion on the ground that the court had expressly left open the issue of whether plaintiffs could establish that any constitutional violation was the result of a policy, custom, or practice under *Monell*, the court rejected the argument, relying on its previous decision in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), which held that claims for declaratory and prospective injunctive relief were not subject to the *Monell* requirements. (App. 3-4.)

In *Chaloux*, the plaintiffs challenged state garnishment procedures by filing suit against a county sheriff charged with enforcing the provisions under state law. 886 F.2d at 248. In finding that the claims for declaratory and prospective injunctive relief were not subject to the *Monell* policy, custom, or practice

requirements, the court construed those limitations as serving only "to alleviate the imposition of financial liability on local governments based solely on *respondeat superior* theory." 886 F.2d at 250.

Yet, in *Monell*, the court plainly stated:

> Local governing bodies ... can be sued directly under § 1983 for monetary, *declaratory, or injunctive* relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers.

Monell, 436 U.S. at 690; emphasis added.

As we discuss, review of *Monell* belies the Ninth Circuit's narrow interpretation and confirms that based upon the statutory language and legislative history, a municipality is subject to the remedial scheme of § 1983 – whatever form the remedy may take – only where the constitutional injury was inflicted as a result of a policy, custom, or practice of the municipality.

A. The Language And Legislative History Of § 1983 Establish That Judicial Intervention, Whether In The Form Of Damages, Declaratory, Or Injunctive Relief Is Only Appropriate Against A Municipality Where The Injury Was Inflicted By The Municipality Itself, i.e., Through A Policy, Custom, Or Practice.

1. The Civil Rights Act of 1871 and rejection of the Sherman amendment.

In *Monell v. Department of Social Services*, 436 U.S. 658, the court reversed its earlier decision in *Monroe v. Pape*, 365 U.S. 167 (1961) and held that municipalities were "persons" under § 1983. *Monell* arose from a challenge to official policies of the City of New York Department of Social Services and Board of Education, which compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. 436 U.S. at 660-61. Plaintiffs sought injunctive relief and backpay for periods of unlawful forced leave. *Id.* Suit was brought directly against the municipality and its various departments, as well as individuals in their official capacities. *Id.*

The district court granted summary judgment, finding the claims for prospective injunctive and declaratory relief moot because the city had changed its policies, and that plaintiffs' claims for backpay were barred because the city and the individuals in their official capacities were not "persons" under § 1983 as

interpreted by *Monroe v. Pape*, 365 U.S. at 265. *Monell*, 436 U.S. at 662.

In reversing *Monroe*, Justice Brennan, writing for the Court, relied on virtually the same legislative history as the *Monroe* court concerning the Civil Rights Act of 1871, most particularly the 42nd Congress's actions with respect to what was termed the Sherman amendment.

There were three stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. Representative Shellabarger, acting for a House select committee, reported H.R. 320, as a bill to enforce the provisions of the Fourteenth Amendment, among other purposes. *Monell*, 436 U.S. at 665. That bill contained four sections, and section 1 is essentially codified as 42 U.S.C. § 1983. *Id.* As the court observed, section 1 "was the subject of only limited debate and was passed without amendment." *Id.*, citing Cong. Globe, 42d Cong., 1st Session, 522 (1871) (hereinafter "Globe"). The remaining sections dealt with the other purpose of suppressing Ku Klux Klan violence and were the subject of the balance of congressional debate. *Monell*, 436 U.S. at 665.

Just prior to the vote on H.R. 320, Senator Sherman introduced an amendment to be added as section 7. Globe at 663. The amendment made the inhabitants of a municipality liable for damage inflicted by persons "riotously and tumultuously assembled. . . ." It allowed the recovery of damages in federal courts as suits against the county, city or parish in which

the damage had occurred. *Id.* However, execution of the judgment was not to run against the property of the government unit, but against the private property of any inhabitant. *Id.*

The House rejected several of the amendments made by the Senate, including the Sherman amendment, and the various versions of the bill went to conference committee. The conference committee draft of the Sherman amendment altered it substantially. It created a cause of action for persons injured by "any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . ." Globe 749, 755, quoted at *Monell*, 436 U.S. at 666, 702. In stark departure from the earlier version, it directly provided for municipal liability.

- The action could be maintained against the county, city or parish in which the riot had occurred. *Id.* at 667.
- If a judgment could not be satisfied by the individual defendants who had committed the violence, the judgment could be collected from the municipality by execution, attachment, mandamus, garnishment or any other proceeding, with the judgment itself a lien upon the municipal treasury. *Id.*

The House rejected this version of the Sherman amendment as well, with the result that a second conference substitute for the amendment abandoned municipal liability and, instead, made any person having knowledge of, and power to prevent, a conspiracy to violate civil rights, liable to any person injured by the conspiracy. *Monell*, 436 U.S. at 668-69; Globe 804. That amendment was eventually codified as 42 U.S.C. § 1986.

2. *Monell* construes rejection of the Sherman amendment as evidencing congressional understanding of the coercive power of civil claims and refusal to make municipalities vicariously responsible for the acts of others.

As Justice Brennan explained in *Monell*, the House's rejection of the prior versions of the Sherman amendment appeared to be based upon concerns that through the threat of damage awards, it indirectly imposed obligations on local municipalities to enforce the law and control the actions of third parties. These were obligations that the federal government had no constitutional power to impose, since the states and only the states could say what law enforcement or other powers would be exercised by their local governments.[4] The court observed that:

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[4] The court quoted extensively from the views of Representative Blair and noted his concerns were shared by other

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> [T]here was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages,

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representatives. 436 U.S. at 674-75. These included the following observations by Blair:

- The "amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. . . .
- [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to.
- [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .
- It was held also in the case of *Prigg vs. Pennsylvania*, 16 Pet. 539, 10 L.Ed. 1060 (1842), that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty." Globe 795, alterations in original.

> attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States."

436 U.S. at 679.

The *Monroe* court had interpreted Congress's rejection of the early versions of the Sherman amendment as evidencing an intent that municipalities not be considered "persons" subject to the provisions of § 1983 at all. *Monroe*, 365 U.S. at 187. In contrast, the *Monell* court observed that while rejection of the Sherman amendment indicated doubt that the federal government could impose new law enforcement functions on a state and its municipalities, there was little dispute that Congress could constitutionally require states and municipalities to enforce state laws they were already empowered to enforce in a manner consistent with the federal Constitution. *Monell*, 436 U.S. at 679-90. The court held, however, that rejection of the Sherman amendment signaled congressional reluctance to impose vicarious liability on a municipality, a concern reflected in the language of § 1983 as originally passed which subjected to liability:

> *[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities

> secured by the Constitution of the United States. . . .

436 U.S. at 691, quoting 17 Stat. 13, alterations in original.

As the court observed:

> The . . . language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend section 1983 liability to attach where such causation was absent.

436 U.S. at 692.

Significantly, the court also observed that in *Rizzo v. Goode*, 423 U.S. 362 (1976) it had previously rejected an often cited justification for *respondeat superior*, i.e., that liability follows the right to control the actions of a tortfeasor. In *Rizzo*, the court rejected injunctive relief against supervisors where they did not personally know of or participate in the constitutional violations attributed to their employees. As the *Monell* court explained, in *Rizzo*, "we would appear to have decided that the mere right to control without any control or direction having been exercised and

without any failure to supervise is not enough to support section 1983 liability." 436 U.S. at 693 n.58.

Thus, the *Monell* court held:

> We conclude, therefore, that a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983.

Id. at 694.

Although *Monell* arose in the context of a claim for monetary relief, by its plain terms and analysis, it applies to all claims for relief under § 1983. Contrary to *Chaloux*'s characterization, rejection of the doctrine of *respondeat superior* in *Monell* was not the result of any concern that damage awards would financially devastate local public entities. To the contrary, the *Monell* court rejected that as a consideration, asserting that it was not supported by the congressional debates. 436 U.S. at 664 n.9. Rather, as noted above, *Monell* rested its holding on the language of § 1983 viewed against the background of congressional understanding of the coercive power of allowing civil claims and a reluctance to impose obligations on municipalities to control or protect against the conduct of others.

B. The Court Has Repeatedly Held That The Policy, Custom Or Practice Requirement Is A Rule Of Causation Implicating Federalism Concerns By Setting Limits On Judicial Intervention Into The Operation Of Municipal Governments.

Following *Monell*, this Court has uniformly reaffirmed the policy, custom or practice requirement as a rule of causation, even if members of the Court have at times sharply disagreed as to its application in particular cases.

See:

- *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) ["municipal liability is limited to actions for which the municipality is actually responsible"];
- *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988) (plurality) ["For our purposes here, the crucial terms of the statute are those that provide for liability when a government 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of constitutional rights. Aware that governmental bodies can act only through natural persons, the Court concluded that these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights," alterations in original]. *Id.* at 138 (Brennan, J., joined by Marshall J. and Blackman, J. concurring ["'the

touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for the deprivation of rights protected by the Constitution' "];

- *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) ["'It is only when the "execution of the government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983,'" alteration in original];

- *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997) ["in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury"];

- *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997) ["We held in *Monell* . . . that a local government is liable under § 1983 for its policies that cause constitutional torts. These policies may be set by the government's lawmakers, 'or by those whose edicts or acts may fairly be said to represent official policy' "].

This court has repeatedly recognized that the policy, custom, and practice requirement draws a proper line between permissible and impermissible judicial intervention in the internal operation of local governments. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the court held that municipal liability

premised upon failure to train law enforcement officers was only appropriate where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. It is only then that inadequate training could "fairly be said to represent a policy for which the city is responsible and for which the city may be held liable if it actually causes injury." 489 U.S. at 390. The court observed that allowing such cases to go forward "on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities," and

> [W]ould also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

Id. at 392.

Similarly, in *Board of the County Comm'rs v. Brown*, 520 U.S. 397 (1997), the court observed:

> A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose.

520 U.S. at 415.

While these cases admittedly concerned claims for damages, that is a distinction without a difference. These causation requirements apply with equal, indeed arguably even greater force with respect to claims for declaratory and prospective relief against municipalities. As we discuss, it would be no more acceptable to constitutionalize "particular hiring requirements" (*Brown*, 520 U.S. at 415) or allow federal courts to engage in "endless exercise of second-guessing municipal employee-training programs" (*Harris*, 489 U.S. at 390) via declaratory or prospective injunctive relief based on the isolated actions of a single municipal employee than it would be through imposing a damage award for the same conduct.

C. The Statutory Language And Principles Of Federalism Underlying The *Monell* Policy, Custom, Or Practice Rule Of Causation Apply With Equal Force To Claims For Declaratory And Other Prospective Relief.

As noted, by its plain terms, *Monell* does not purport to limit the policy, custom, or practice causation requirement to claims for damages. To the contrary, *Monell* expressly states that this rule of causation applies to claims for "declaratory, or injunctive relief. . . ." *Monell*, 436 U.S. at 690. Indeed, *Monell* pointedly does not repeatedly tie the policy, custom, or practice requirement to damages claims, but rather, refers to it as a threshold requirement before a claim is even actionable under § 1983. In short, "a local government *may not be sued* under § 1983 for an

injury inflicted solely by its employees or agents." *Id.*, emphasis added. It is only when "execution of a government's policy or custom . . . inflicts the injury that the government as an entity is *responsible* under § 1983." *Id.*; emphasis added; *see also Pembaur*, 475 U.S. at 478 ["*Monell* is a case about responsibility"].

As stated in *Monell* and its progeny, it is only when a policy, custom, or practice of the municipality inflicts the constitutional injury that the defendant "shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983. Declaratory relief under 28 U.S.C. § 2201 is nothing more than an additional remedy to be afforded if and only if the plaintiff meets the causation requirements set forth in § 1983.[5]

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[5] 28 U.S.C. § 2201 reads in pertinent part as follows:

Section 2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall

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Moreover, as Justice Brennan stated in *Monell*, the 42nd Congress well understood that claims for damages under a federal statute were a means by which the federal government could indirectly impose obligations on states and municipalities to take particular actions. *Id.*, 436 U.S. at 679. As noted, the court concluded that Congress did not believe it could indirectly impose an obligation on municipalities to enforce state laws or undertake other acts that they were not empowered to enforce under state law. However, Congress could indirectly compel municipalities to enforce those laws they were authorized to enforce in a manner consistent with the United States Constitution by exposing them to potential damage claims, but only where injury was inflicted as a result of a policy, custom, or practice. Thus, indirect control over local public entities is subject to a policy, custom, or practice requirement. Yet, paradoxically, under the Ninth Circuit's view, direct control over a local public entity either through declaratory relief or prospective injunctive relief is subject to a lesser standard of causation. This illogical rule simply does not withstand scrutiny in light of the legislative history of § 1983 and the court's holding in *Monell*.

In addition, the federalism concerns this court has identified as inextricably linked to the policy, custom, or practice causation requirement apply with

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have the force and effect of a final judgment or decree and shall be reviewable as such.

equal force to claims for declaratory or other prospective relief that operate directly on a public entity. While damage awards can pose a threat to a public treasury, declaratory and injunctive relief allow a court to directly control the manner in which a local public entity operates, and set specific standards or procedures for even the most basic government functions. As this court observed in *Rizzo v. Goode* in rejecting injunctive relief against municipal supervisors who had not personally violated the plaintiffs' constitutional rights:

> The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees. However, on the facts of this case, not only is this novel claim quite at odds with the settled rule that in federal equity cases 'the nature of the violation determines the scope of the remedy,' . . . [Citation] but important considerations of federalism are additional factors weighing against it. Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli v. Minard*, 342 U.S. 117, 120, 72 S. Ct. 118, 120, 96 L. Ed. 138 (1951), quoted in *O'Shea v. Littleton*, 414 U.S. [488] at 500, 94 S. Ct. at 678 [(1974)].

Rizzo, 423 U.S. at 378.

Similarly, here, the high level of intrusion into the operation of a municipality occasioned by declaratory relief is justified only when a plaintiff at least establishes that a constitutional injury has been inflicted as a result of some policy, custom, or practice fairly attributable to the public entity.

Further, claims for declaratory relief and prospective injunctive relief can have profound financial impact on a local public entity. Declarations with respect to the sufficiency or insufficiency of particular procedures, or prospective injunctive relief directing particular types of procedures be instituted, may spawn significant collateral costs. And as this case indicates, an award for declaratory relief can lead to fee awards, which in many cases may be substantial.

D. Applying A Lesser Standard Of Causation To Claims For Declaratory Relief Leads To Illogical And Inconsistent Results.

Allowing claims for declaratory relief to proceed on a lesser standard of causation than applicable to a claim for damages leads to inconsistent and illogical results. For example, here, the Ninth Circuit found that plaintiffs had essentially established declaratory relief as against the County because it had "held that the State and County procedures used in maintaining the Child Abuse Central Index ... were constitutionally insufficient, and thus the Child Abuse and Neglect Reporting Act ... 'violates the Humphries' procedural due process rights.'" (App. 2.) Yet,

what are the "procedures" of the County that have been declared violative of due process? The procedures in this particular case? Procedures that are the equivalent of a policy for purposes of *Monell*? Surely not the latter, since, as the Ninth Circuit acknowledged, at this stage of the litigation the existence of a policy, custom, or practice under *Monell* has not even been litigated and remains an open issue.

Moreover, in apportioning the fee award 90%-10% as between the State and the County, the court determined that the State would bear the lion's share because it crafted "the statutory and regulatory provisions that created the CACI and its attendant review procedures[,]" while the County had failed "to craft its own additional procedural protections. . . ." (App. 3.) This allocation, however, necessarily required the court to make some assessment of fault and ultimate liability, albeit untethered to any substantive principle of liability. Thus, the County is liable for failing to craft additional procedures, without any showing that the County, through a responsible policymaking official, should have been so plainly aware of the need for additional training, procedures or policies, that the failure to take action rose to the level of deliberate indifference. *See, e.g., City of Canton v. Harris*, 489 U.S. at 388; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1988).

In addition, the very question of whether the County could, under state law impose its own procedures over and above those set forth in CANRA was an issue that went squarely to the County's potential

liability under *Monell*. California law suggests that the County was not free to impose its own procedures under state law and substantial federal authority supports the proposition that *Monell* liability cannot be imposed on a public entity merely for enforcing state law.[6]

As the Ninth Circuit acknowledged in its opinion, the County's liability for damages under *Monell* remains at issue. (App. 72.) With respect to the damage claim, it could be determined that in fact no policy, custom, or practice fairly attributable to Los Angeles County inflicted any sort of constitutional injury on the plaintiffs. Whether any alleged injury was inflicted as a result of a random act of an employee,

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[6] *See, Birkenfeld v. City of Berkely*, 17 Cal. 3d 129, 150-52, 550 P.2d. 1001; 130 Cal. Rptr. 465 (1976) [city could not create additional procedures for unlawful detainer actions]; *American Financial Services Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1251, 104 P.3d 813, 23 Cal. Rptr. 3d 453 (2005) [city ordinance could not regulate predatory lending practices more stringently than state regulations]; *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 790-93 & n.4 (7th Cir. 1991) [merely enforcing state law is insufficient to establish a municipal policy under Monell]; *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) [county not liable under *Monell* for County Social Services Board's termination of director, where Board "enjoyed its discretion to fire (director) at the prerogative of and within the constraints imposed by the (state)"]; *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) [county not liable under *Monell* for county judge's ministerial role in enforcing unconstitutional state statute]; *Doby v. De Crescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ["when a county is merely enforcing state law, without adopting any particular policy of its own, it cannot be held liable under . . . *Monell* . . . "].

or whether, in the end the County cannot be held liable merely for enforcing state law, the result is the same – a determination that is squarely at odds with the finding of "liability" with respect to the declaratory relief claim.

The Ninth Circuit's asymmetrical imposition of municipal liability depending upon the nature of the relief sought must be rejected. There is no justification for imposing a lower causation threshold on claims for declaratory or other prospective relief against public entities than for damages. As recognized by *Monell* and its progeny, the policy, custom, and practice requirement is a rule of causation defining the limits of federal power and absent establishing constitutional liability under those standards, no remedy, whether it be damages, injunctive or declaratory relief, is appropriate.

E. Application Of The *Monell* Requirements To Claims For Declaratory Or Other Prospective Relief Is Consistent With The Manner In Which The Court Has Treated Official Capacity Claims Against State Officials.

As noted, in *Chaloux*, the Ninth Circuit held that plaintiffs seeking to challenge Idaho execution and garnishment statutes could properly obtain declaratory and injunctive relief against a county sheriff and other county officials in their official capacities without satisfying *Monell*'s policy, custom, or practice requirement. As we have explained,

Chaloux premised its holding on an incorrect interpretation of *Monell* as being limited solely to damage claims against local public entities. It further found, however, that its approach – allowing plaintiffs to obtain declaratory and injunctive relief against local officials in their official capacity based on enforcement of state law – was consistent with this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908) allowing claims for injunctive relief against state officials charged with the responsibility of enforcing state law. *See Chaloux*, 886 F.2d at 251. The Ninth Circuit concluded that because only county sheriffs could enforce the state law at issue, they were proper parties under *Ex Parte Young*. *Id.*

Yet, *Chaloux*'s reasoning does not withstand scrutiny. As a threshold matter, here, plaintiffs have brought an official capacity suit against the very state official charged with defending the constitutionality of all state laws and maintaining the Index – the California Attorney General. And, plaintiffs' claim for declaratory relief against the County is premised on allegations not simply that the County was merely enforcing an unconstitutional state law, but also purported County policies, customs, and practices concerning what information it would provide to the state in requesting that individuals be taken off the database. (ER 24-25.) Thus, *Chaloux*'s rationale for invoking *Ex Parte Young* is simply inapplicable here since the actual state official charged with enforcing state law is a defendant and, more fundamentally, one aspect of plaintiffs' declaratory relief claim is

premised upon the conduct of individual county employees.

More critically, *Chaloux* misreads this Court's Eleventh Amendment jurisprudence as purportedly making prospective relief available against state officials without establishing action fairly attributable to the state equivalent to those factors imposing *Monell* liability on municipalities. Yet, this Court has repeatedly invoked *Monell* in discussing the manner in which state officials may be sued in their official capacity for enforcing state law.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court invoked *Monell* in explaining the differences between suing a state official in a personal, as opposed to official, capacity:

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. [Citation.] More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "'moving force'" behind the deprivation, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell* [436 U.S.] at 694); thus, in an official-capacity suit, the entity's "policy or custom" must have played a part in the violation of federal law.

Id. at 166, parallel citations omitted, original emphasis.

Hafer v. Melo, 502 U.S. 21, 25 (1991) reaffirmed *Graham*: "Suits against state officials in their official capacity . . . should be treated as suits against the State" and "[b]ecause the real party in interest in an official capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law.'"

Indeed, consistent with *Hafer* and *Graham,* in *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007) the court rejected claims for prospective injunctive relief against *state officials* because plaintiffs failed to satisfy *Monell*'s requirements of a policy, custom or practice attributable to the state as causing plaintiffs' injuries.

The same is true with respect to claims for declaratory and other prospective relief against County officials in their official capacity or against a county directly itself. The challenged action or statue must be fairly attributable to the County itself. Nothing in this Court's Eleventh Amendment jurisprudence supports, let alone compels abandonment of *Monell*'s policy, custom, and practice requirements to claims against municipalities for declaratory or other prospective relief.

CONCLUSION

Petitioner respectfully submits that any claim for declaratory relief is subject to the *Monell* policy, custom or practice requirement. Because petitioner's liability under *Monell* remains an open issue, respondents are not prevailing parties under *Hanrahan v. Hampton*, 446 U.S. 754 (1980) and the Ninth Circuit's order determining respondents to be prevailing parties and subsequent fee award, must be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

SUPREME COURT
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No. 09-350

In the Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

v.

CRAIG ARTHUR HUMPHRIES AND
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a municipality engaged in an ongoing violation of the Constitution is immune from declaratory and other prospective relief in an action under 42 U.S.C. § 1983 in the absence of a separate, express determination that the constitutional violation stems from a municipal policy or custom?

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The court of appeals' order awarding interim attorneys' fees (Pet. App. 1-4) is unreported. The court of appeals' second amended opinion addressing respondents' procedural due process claim (Pet. App. 5-72) is reported at 554 F.3d 1170 (9th Cir. 2009). The court of appeals' first amended opinion (Pet. App. 73-142) is unreported. The court of appeals' initial opinion (Pet. App. 143-209) is published at 547 F.3d 1117 (9th Cir. 2008). The district court's opinion (Pet. App. 210-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2009 (Pet. App. 1) and the petition for a writ of certiorari was filed on September 21, 2009, and was granted on February 22, 2010 (limited to the first question presented). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Respondents Craig and Wendy Humphries are trapped in what the court of appeals described as a "nightmar[e]." Pet. App. 18. On the basis of false allegations, the Humphries were listed in the Child Abuse Central Index ("Index"), California's child abuse registry. They obtained a ruling by one court that the child abuse allegations asserted against them were "not true," and a ruling by a second court that they were "factually innocent" of the arrest charges that arose from those allegations. But the Humphries nonetheless remain listed in the Index, which is used by third parties in making licensing,

employment, child custody, and other important decisions

The court of appeals held that, by failing to provide an adequate procedure for removal of names wrongly included in the Index, the State and the County violated the Humphries' federal constitutional right to procedural due process, and remanded the case for further proceedings consistent with its opinion. Petitioner did not seek review of that constitutional ruling.

The court of appeals subsequently awarded the Humphries interim appellate attorneys' fees under 42 U.S.C. § 1988, based on its determination that the Humphries had prevailed on their claim for declaratory relief. The court directed the State to pay ninety percent of the fee award and the County ten percent.

The County's petition relates solely to its obligation to pay its portion of this interim award—approximately $60,000. The County argues that the court of appeals' finding of an ongoing violation of the Constitution is insufficient to permit an award of interim fees. It contends that an additional, separate determination—that the County acted pursuant to one of its own policies or customs—is also required.

That standard, never before applied by this Court in a case involving prospective relief to remedy an ongoing constitutional violation, would deprive the federal courts of the power to halt continuing violations of constitutional rights in a variety of contexts. The Court should reject petitioner's invitation to alter dramatically the standards governing the availability of the judicial redress that is critical to vindicating the rights guaranteed by the Constitution.

A. Statutory Background

The California Department of Justice ("DOJ") maintains the Child Abuse Central Index (the "Index"), a database of alleged child abuse information submitted to DOJ by agencies throughout California. DOJ has been compiling such information since 1965. See 1965 Cal. Stat. 1171 (formerly codified at Cal. Penal Code Ann. §§ 11110, 11161.5). Since 1988, maintenance of the Index has been governed by the Child Abuse and Neglect Reporting Act ("CANRA"), Cal. Penal Code §§ 11164 *et seq.*[1]

DOJ derives Index entries from "Child Abuse Investigation Report" forms,[2] filled in and sent to DOJ by local welfare and law enforcement agencies that investigate reports of suspected child abuse or neglect ("submitting agencies"). See Cal. Penal Code §§ 11165.9, 11169(a), 11170(a)(1).[3] DOJ culls information from the submitted forms—including identifying

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[1] In 1980, California enacted the Child Abuse Reporting Law, which overhauled provisions for reporting and compiling child abuse information. 1980 Cal. Stat. 1071, § 4, codified as amended at Cal. Penal Code §§ 11165 *et seq.* The statute was renamed the Child Abuse and Neglect Reporting Act as of January 1, 1988. See 1987 Cal. Stat. c. 1444.

[2] From the mid-1980's through 2009, DOJ issued several versions of these forms, all designated "SS 8583" forms. Cal. Code Regs. tit. 11, § 903(b) (May 12, 2006); see also Ct. App. E.R. 303, 333, 336-39, 244-248, 356, 396-404. A new designation, "BCIA [DOJ Bureau of Criminal Information and Analysis] 8583" appears on the form revised as of January 5, 2010. Cal. Code Regs. tit. 11, § 901.

[3] Suspected child abuse reports may originate from "mandated reporters," *i.e.*, persons who hold any of the positions specified in Cal. Penal Code § 11165.7 (teachers, physicians, etc.); commercial film or photographic print processors, or "[a]ny other person." *Id.* § 11166(a), (e), (g).

data on named victims and suspects, the type of abuse alleged, the submitting agency's classification of the report, and the submitting agency's file number—and enters it into the Index. ER 302-04; see Cal. Code Regs. tit. 11, §§ 900, 901 (Jan. 5, 2010).

California law mandates that certain entities consult the Index and conduct an additional investigation of Index-listed individuals in deciding whether to grant those individuals certain rights or benefits, including various licenses, jobs and volunteer opportunities, or custody of a child. Pet. App. 14-15; see Cal. Penal Code §§ 11170(b) & 11170.5; Cal. Health & Safety Code §§ 1522.1(a), 1526.8(b)(2), & 1596.877(b). Further, CANRA makes Index information available to a range of other entities, both within and outside of California, for specified purposes. See Pet. App. 13, n.1; Cal. Penal Code § 11170(e); see also Cal. Code Regs. tit. 11, § 905(b) (Jan. 5, 2010).[4]

CANRA prohibits the submission of information for entry in the CACI unless the submitting agency "has conducted an active investigation and determined that the report is not unfounded, as defined in [Cal. Penal Code] Section 11165.12." Cal. Penal Code § 11169(a). Under Section 11165.12(a), an "[u]nfounded report" is one "determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as

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[4] CANRA states that such third party recipients of Index data "are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions" regarding the contents of those files for purposes of "making decisions" regarding employment, licensing, adoption or child placement. Cal. Penal Code §§ 11170(b)(10)(A), 11170.5(b).

defined in Section 11165.6." Accordingly, a report that has been determined not to meet any of these four criteria is *not* unfounded.

In addition to requiring that a report be determined to be not "unfounded" prior to submission for entry in the Index (Cal. Penal Code § 11169(a)), the statute defines two sub-classifications of "not unfounded" reports—"substantiated reports" and "inconclusive reports." Cal. Penal Code § 11169(b), (c).[5] Under DOJ regulations, before submitting a report for listing in the Index, an agency must classify it either "substantiated" or "inconclusive" by marking one of those pre-printed options on the reporting form, which determines the listing's retention period. Cal. Code Regs. tit. 11, § 901 (Jan. 5, 2010); see former § 903(a), (b) (May 24, 2002) at ER 397-400.

CANRA states that "submitting agencies are responsible for the accuracy, completeness, and retention of the reports" they submit for listing in the Index. Cal. Penal Code § 11170(a)(2).

The statute does not specify a retention period for Index listings arising from reports classified "substantiated," such as the report involved in this case.[6] DOJ's policy is to retain such listings in the

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[5] An "[i]nconclusive report" (formerly called an "[u]nsubstantiated report") is one determined "not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred." Cal. Penal Code § 11165.12(c).

[6] Respondents' Index listing was created in 2001. At that time CANRA defined a "substantiated report" as one "determined by the investigator who conducted the investigation, based upon some credible evidence, to constitute child abuse or neglect, as defined in Section 11165.6." Cal. Penal Code § 11165.12(b). As

Index permanently, unless the submitting agency notifies DOJ that the report has been reclassified as "unfounded" or "inconclusive," or that there is no available investigative file that supports the listing. Ct. App. E.R. 307-09, 493.[7]

CANRA provides for purging of "inconclusive or unsubstantiated" reports ten years after entry in the Index unless DOJ receives another report on the same "suspected child abuser" within that period, in which case DOJ retains the listing for at least ten more years, measured from the receipt of the more recent report. Cal. Penal Code § 11170(a)(3).

The statute does not specify a procedure for challenging Index listings. It states that, "[i]f a report has previously been filed which subsequently proves to be unfounded, the [DOJ] shall be notified in writing of that fact and shall not retain the report," but the statute does not state how a report may be proved unfounded, or who may notify DOJ of "that fact." Cal. Penal Code § 11169(a); Pet. App. 16-17.

The court of appeals determined that "nothing in the statute prevents a submitting agency from enacting some procedure to allow an individual to chal-

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amended in 2005, the provision defines a "substantiated report" as one "determined by the investigator who conducted the investigation to constitute child abuse or neglect, as defined in Section 11165.6, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred." See Cal. Stats. 2004, ch. 842, § 6.

[7] The County is wrong in asserting (Pet. Br. 6) that all "not unfounded" reports are "removed from the Index ten years after entry" if DOJ "receives no further child abuse reports regarding the listed person." The statutory provision cited by the County—Cal. Penal Code § 11170(a)(3)—does not provide for removal of "substantiated" reports. See Pet. Br. 6.

lenge their listing or seek to have a determination that a report is 'unfounded.'" Pet. App. 17-18. However, neither the County of Los Angeles nor the Los Angeles County Sheriffs' Department ("LASD")—the submitting agency in this case—has enacted such a procedure for individuals included in the Index as a result of reports submitted by LASD. *Id.* at 8, 48-49, 71-72.

B. Factual Background

The court of appeals aptly described the events that led to the filing of this action as respondents' "nightmarish encounter with the CANRA system." Pet. App. 18.[8]

Wendy Humphries, a special education teacher at a public elementary school, and her husband Craig Humphries, an executive with a California company and a volunteer soccer coach and basketball coach, were falsely accused of child abuse by "S.H.", Mr. Humphries' then-teenage daughter from a pre-

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[8] The County's brief presents (Pet. Br. 7-10) a detailed—and in parts inaccurate—discussion of the allegations against the Humphries, which the Los Angeles County Superior Court, Juvenile Division ("juvenile court") subsequently held were "not true" Pet. App. 23. We will not burden the Court with a lengthy rebuttal of the County's presentation of these allegations, which serve no purpose other than to continue the "nightmare" described by the court of appeals.

One misstatement typifies these errors: the County overstates what Wilson had received from Utah when he arrested the Humphries and completed his report for submission to the Index. See Pet. Br. 8-9. Wilson had not received any photographs or videotaped interview, nor did he ever receive any report prepared by the Utah Department of Human Services, Division of Child and Family Services. See Appellants' Supp. ER 17-19, 26-30, 41, 43, 46, 50-52; ER 143-44, 274-93, 630.

vious marriage. As a result of this accusation, they were arrested by Detective Michael Wilson of the LASD on April 16, 2001. Pet. App. 19; Ct. App. E.R. 202.[9]

That same day, a sheriff's deputy, acting without a warrant, picked up the Humphries' children "J.A." and "C.E." at their schools and took them into "protective custody." The County placed the children in foster care, even though they "denied any fear of abuse or mistreatment and indicated their desire to return home." Pet. App. 19.

The following day, April 17, based on S.H.'s allegations, Detective Wilson completed a Child Abuse Investigation Report for submission to the Index. He named Craig and Wendy Humphries as the "suspects"; identified S.H. as the "victim"; stated the "incident" took place from December 1, 2000, to March 18, 2001; identified LASD's file number; and marked the report "substantiated." Pet. App. 20; Ct. App. E.R. 241. The Sheriff's Department then forwarded Detective Wilson's report to DOJ, which in turn entered the data into the Index, listing respondents "as child abuse suspects with a 'substantiated' report." Pet. App. 20.

Detective Wilson filed a misdemeanor complaint against the Humphries in the Los Angeles County Superior Court, again based on S.H.'s allegations. Pet. App. 20; Ct. App. E.R. 433-34. Additionally, based on the same allegations, the County filed a

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[9] Respondents were arrested and booked on the single charge of felony torture under California Penal Code § 206, on April 16, 2001. Pet. App. 19. Two days later, Wilson filed a complaint with misdemeanor charges in the Los Angeles County Superior Court. See page 8, *infra*.

separate petition in the Los Angeles County Superior Court, Juvenile Division, commencing non-criminal proceedings to have C.E. and J.A. declared dependent children of the juvenile court on grounds that their "sibling has been abused or neglected." Pet. App. 23 (internal quotation marks omitted).

After spending ten days in foster care, J.A. and C.E. were returned to the Humphries' custody. Pet. App. 19, 213. Subsequently, on June 12, 2001, the juvenile court adjudicated and dismissed all counts of the dependency petition as "not true." *Id.* at 23.

The criminal charges against the Humphries were dismissed in August 2001. Pet. App. 21. The prosecutor had learned that, during the timeframe of the alleged abuse claimed by S.H., an oncologist "examined S.H.'s entire body" on repeated occasions and "saw no sign of abuse," contradicting "the basic part of [S.H.'s] testimony that she was injured during the entire time." *Ibid.* (internal quotation marks omitted).

Prior to the dismissals of the dependency and criminal actions, the Humphries received notice that they were listed in the Index. The notice "informed them that if they believed the report was unfounded, and they desired a review, * * * they should address their request to Detective Wilson." Pet. App. 24.

After the dependency and criminal actions were dismissed, the Humphries, through their attorney, contacted LASD's Family Crimes Bureau. They learned that "Detective Wilson no longer worked at the Bureau, and that there was no available procedure for them to challenge their listing in the [Index]." Pet. App. 24. On May 9, 2002, LASD Sergeant Michael Becker advised the Humphries' attorney

that, after reviewing the matter, LASD would not reverse its report to the Index because "the fact that the case was dismissed 'would not negate the entries' into the [Index]." *Ibid.* Respondents were not permitted to present any evidence to Becker. Ct. App. E.R. 593-94.

Thereafter, in December 2002, the Humphries sought and obtained orders from the criminal court, finding the Humphries "'factually innocent' of the felony torture charge, and requiring the arrest records pertaining to that charge be sealed and destroyed." Pet. App. 21-22; see Cal. Penal Code § 851.8. In finding factual innocence, the criminal court "found 'that no reasonable cause exists to believe that the [Humphries] committed the offense for which the arrest was made.'" Pet. App. 22-23.

Subsequently, in response to a questionnaire from DOJ, a clerical worker in LASD's Family Crimes Bureau "confirmed" to DOJ that the Index-listed report on the Humphries was still "substantiated" as of October 31, 2003. Pet. App. 25; ER 485-88, 511-25, 576-77, 591, 596-607. The Humphries had no notice of this "confirmation." ER 316-17.

The court of appeals observed that "[d]espite the fact that two independent California tribunals had found that the allegations underlying the Humphries' [Index] listing were 'not true' and that the Humphries are 'factually innocent,' the CA DOJ continues to list the Humphries in the [Index] as substantiated child abusers. Furthermore, because the Humphries [are] listed pursuant to a 'substantiated report,' they will remain listed on the [Index] indefinitely." Pet. App. 25.

C. Proceedings Below

Following the refusal of the County and State to expunge respondents' names from the Index, respondents commenced this action in the District Court for the Central District of California asserting claims for declaratory and injunctive relief and damages under 42 U.S.C. § 1983.[10] Respondents subsequently filed an amended complaint requesting declaratory relief against the County, the Attorney General, and the County Sheriff "that CANRA and the County's and State's CACI-related policies are unconstitutional because they provide no means for people, such as the Humphries, to dispute or expunge their CACI listing or to prevent disclosures of the listing and related records." Pet. App. 28.

They requested injunctive relief against all defendants ordering "the County of Los Angeles to notify the [California Department of Justice] that LASD's report to the CACI is unfounded, and to prohibit the State from retaining or disclosing the CACI records on the Humphries based on any report from LASD." Pet. App. 28. The Humphries also requested damages from the County, the County Sheriff, and the two detectives for injuries resulting from the constitutional violations. *Id.* at 27-28.[11]

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[10] The amended complaint named five defendants: Los Angeles County; California Attorney General Bill Lockyer in his official capacity; County Sheriff Leroy D. Baca in his official and individual capacities; and Los Angeles Sheriff's Department Detectives Wilson and Ansberry in their official and individual capacities. Ct. App. E.R. 4-5.

[11] The amended complaint also included claims under Section 1983 relating to respondents' arrests and the removal of their children, as well as five state-law counts that were dismissed by the district court and not appealed. Pet. App. 27-29.

1. *The District Court's Ruling.* The district court granted summary judgment in favor of the defendants. Pet. App. 254. The court determined that the individual defendants were entitled to qualified immunity. It also granted summary judgment for the County and the State Attorney General on the due process claim, holding that respondents' interest "in remaining or being taken off of the Index simply does not fall within the types of 'liberty' interests courts traditionally recognize." *Id.* at 234.[12]

2. *The Court of Appeals' Decision.* The court of appeals unanimously reversed the grant of summary judgment on the due process claim, holding that the failure of the County and State to provide a mechanism for individuals to challenge and reverse their inclusion in the Index violated respondents' procedural due process rights.

The court of appeals first determined that, under this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), "the stigma of being listed in the [Index] as substantiated child abusers, *plus* the various statutory consequences of being listed on the [Index] constitutes a liberty interest, of which [respondents] may not be deprived without process of law." Pet. App. 30-31.

The court found that "CANRA creates too great a risk of individuals being placed on the CACI list who do not belong there, and then remaining on the index indefinitely." Pet. App. at 67-68. Thus it held that

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[12] The district court also granted summary judgment for defendants on the Section 1983 claims relating to respondents' arrests, and denied the motions for summary judgment by the County and Detective Wilson on the Section 1983 claim arising from the warrantless seizure of the children. Pet. App. 28.

procedural protections against the entry and retention of erroneous Index listings were "constitutionally inadequate." *Id.*; see also *id.* at 2 ("the State and County procedures used in maintaining the [Index] were constitutionally insufficient, and thus [CANRA] violates [respondents'] procedural due process rights").

The court concluded that due process requires prompt notification to an individual that his name has been included and "'some kind of hearing' by which he can challenge his inclusion." Pet. App. 68. "The opportunity to be heard on the allegations ought to be before someone other than the individual who initially investigated the allegation and reported the name for inclusion on the [Index], and the standards for retaining a name on the [Index] after it has been challenged ought to be carefully spelled out." *Ibid.*

Nothing in the governing statute "prevented the [LASD] from creating an independent procedure that would allow the Humphries to challenge their listing on the Index." Pet. App. 72. Instead, the LASD made Detective Wilson "investigator, prosecutor, judge, and jury with respect to the Humphries' CACI listing." *Id.* at 58. Because the County had "no standard, no superior outlet for review, and thus no danger of [Detective Wilson] being overturned—it is highly unlikely that an investigator will in effect, reverse himself." *Ibid.* Thus "any errors made in the initial referral to the CACI are, therefore, likely to be perpetuated" because respondents "have no statutory recourse elsewhere within the LASD." *Id.* at 57-58. That violated their due process rights.

The court of appeals recognized that the district court had no occasion to address whether the County

had acted pursuant to a municipal "policy or custom" within the meaning of *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978). It therefore remanded to the district court for further proceedings on that question. Pet. App. 208-09.

Following a petition for rehearing by the County, the court amended its opinion to make clear that it reached no decision regarding the *Monell* issue. See Pet. App. 75-76. It subsequently further amended its opinion to reflect the need to consider the County's liability under the *Monell* standard, rather than under a qualified immunity test. *Id.* at 7, 71-72.

3. *The Court of Appeals' Interim Award of Attorneys' Fees.* The court of appeals, in a unanimous unpublished order, subsequently granted respondents' motion for an interim award of attorneys' fees pursuant to 42 U.S.C. § 1988. Pet. App. 1-4.

The court found "that the Humphries have prevailed on their claim for declaratory relief and are thus entitled to an award of attorneys' fees" against the County and the State. Pet. App. 2. The court's holding that the State and County procedures violated respondents' due process rights "'materially alters the legal relationship between the parties by modifying the defendants' behavior in a way that directly benefits the plaintiff.'" *Ibid.* (quoting *Farrar* v. *Hobby*, 506 U.S. 103, 111-12 (1992)).

The court rejected the County's argument that it could not be held liable for fees in the absence of a finding that it violated the *Monell* policy or custom standard, stating that "it is well established in our circuit that the limitations to liability established in *Monell* do not apply to claims for prospective relief."

Pet. App. 3-4 (citing *Chaloux* v. *Killeen*, 886 F.2d 247, 250 (9th Cir. 1989)).

The State, the court determined, was "responsible for 90% of the fees awarded" because it "craft[ed] the statutory and regulatory provisions that created the CACI and its attendant review procedures." Pet. App. 3. The County was responsible for 10% of the fees awarded because it "fail[ed] to craft its own additional procedural protections" to allow innocent parties to have their names removed from the CACI. *Ibid.*

On October 2, 2009, the special master appointed by the court of appeals to recommend the amount of the fee award recommended a total award of $592,580.92. Report at 19. The master did not award attorneys' fees "for work performed on unsuccessful claims that are unrelated to the successful claims." *Id.* at 14. The County's 10% share is $59,258.09. *Id.* at 20. The County did not object to the master's report and recommendation. Oct. 2009 Ct. App. Order at 2 (Dkt. No. 152).

SUMMARY OF ARGUMENT

Petitioner contends that a plaintiff who is suffering continuing injury from an ongoing—*and proven*—violation of the Constitution, and who has satisfied the standing and other requirements for issuance of prospective relief, still may not obtain that relief in suits against municipalities and state or local government officials. Endorsement of that proposition by this Court would work a dramatic change in the federal courts' power to provide redress for constitutional violations. Nothing in this Court's precedents support such a result.

Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978), held that claims against a municipality under Section 1983 require proof of a causal link between the plaintiff's injury and a municipal policy or custom. All of the subsequent cases in which the Court has elucidated the standard for proving that link have involved only claims for damages.

This case requires the Court to address for the first time how Section 1983's causation requirement applies to claims for prospective relief. Extending to this very different context the standard developed for damages claims is unnecessary and inappropriate for four basic reasons.

First, the legal standards applicable to a claim for prospective relief with respect to a continuing constitutional violation—Article III's standing constraints and the other principles governing the issuance of such relief—already require a plaintiff to show that the municipality caused the violation. To prove an entitlement to prospective relief with respect to a continuing constitutional violation *is*, in other words, to prove a custom or policy.

The concern that motivated the *Monell* "policy or custom" requirement—ensuring a causal link between the municipality and the underlying violation—will therefore always be satisfied in the context of a successful claim for prospective relief against a continuing offense. These requirements for obtaining prospective relief, of course, do not apply to damages claims, which is why a separate showing of causation is necessary in the damages context but is not needed here.

Second, a municipality's decision to continue to engage in conduct notwithstanding a lawsuit challenging the conduct on constitutional grounds—and defend against the claim in court—itself constitutes a municipal policy that is a moving force behind the continuation of the deprivation of constitutional rights. It is equivalent to the "deliberate indifference" that the Court has found sufficient to satisfy the causation requirement in the damages setting.

Third, transferring wholesale the standard from the damages context will deprive courts of the power to stop continuing violations of constitutional rights in a variety of situations. For example, petitioner points to lower court decisions holding that a municipality may not be held liable in damages for enforcing a state policy or custom and argues that principle extends to claims for prospective relief as well.

But how would a plaintiff proceed with respect to an unconstitutional state statute that provides for enforcement by the State's municipalities? Because the State does not enforce the statute, obtaining prospective relief against it would not remedy the ongoing violation of the plaintiff's rights. But a municipality would argue, as petitioner argues here, that—because there is no municipal policy or custom causing the violation—it is immune from prospective relief. That outcome would leave the individuals suffering continuing injury to their constitutional rights without any means of remedying that ongoing violation. Standards developed to fit the particular characteristics of damages actions simply do not fit the very different context of claims for prospective relief.

Fourth, this Court has explained that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily suffi-

cient to invoke the" *Ex parte Young* doctrine and permit an official capacity action against a state official to go forward without violating the immunity granted to states by the Eleventh Amendment. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). If petitioner's argument were accepted, municipalities would receive greater protection against federal suits for prospective relief than that accorded to States. Given the States' as sovereigns, that result makes no sense.

Petitioner's contention that that the two situations are parallel, and that claims for prospective relief against States also must satisfy the policy or custom standard developed for damages claims, would limit even more dramatically the authority of federal courts to provide relief against ongoing constitutional violations. The Court should reject that approach, decline to extend the damages standard to claims for prospective relief, and hold that when a plaintiff seeks prospective relief, a separate showing of municipal responsibility is not required because the other standards applicable to such claims ensure the requisite connection between the municipality and the challenged conduct.

ARGUMENT

THE REQUIREMENT OF A SEPARATE SHOWING OF A MUNICIPAL POLICY OR CUSTOM DOES NOT EXTEND TO CLAIMS FOR PROSPECTIVE RELIEF.

This Court concluded in *Monell* that "a municipality cannot be held liable [under Section 1983] *solely* because it employs a tortfeasor"; there must be a causal link between the plaintiff's injury and a municipal policy or custom. 436 U.S. at 691 (emphasis

in original). *Monell* and the Court's subsequent cases addressing this issue all applied this principle in the context of claims for damages and other retrospective relief.

Respondents here seek prospective relief to remedy an ongoing constitutional violation from which they are suffering continuing, significant injury. The conduct that gave rise to respondents' Section 1983 claim has been held unconstitutional, and the County did not seek review of that determination. But the County nonetheless continues to engage in that unconstitutional conduct (by failing to provide respondents with due process).

In this situation—where conduct found to violate the Constitution is ongoing and the plaintiff seeks prospective relief—a separate showing of a municipal policy or custom is not a prerequisite for an award of declaratory or injunctive relief. The necessary causal link between the unconstitutional act and municipal policy or custom is established in two ways. First, because the legal requirements that a plaintiff must satisfy to obtain prospective relief themselves require the plaintiff to establish such a causal link. Second, because the position adopted in the litigation by the municipality, speaking through its authorized legal representatives—refusing to conform its conduct to the requirements of the Constitution—constitutes an act of the municipality that causes the plaintiff's continuing injury.

A. Persons Suffering A Continuing Injury Caused By A Constitutional Violation Should Be Able To Obtain Relief To Stop The Ongoing Violation.

This Court has long recognized the importance of judicial redress for ongoing violations of constitutional rights. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

The seminal decision in *Ex parte Young*, 209 U.S. 123 (1908), squarely addressed this question. There, the issue was whether the Eleventh Amendment barred the federal courts from hearing a suit seeking an injunction barring a State attorney general from enforcing a statute claimed to violate the federal Constitution. This Court held that

> [i]f the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60. This rationale encompasses mandatory as well as prohibitory injunctions. *Id.* at 158-59; see also *id.* at 168 (discussing federal court orders directing release of persons in state custody). *Young* "permit[s] the federal courts to vindicate federal rights

and hold state officials responsible to the supreme authority of the United States. * * * * [T]he *Young* doctrine rests on the need to promote the vindication of federal rights." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (citations and internal quotation marks omitted).

Petitioner argues for a significant limitation on federal courts' power to provide redress for ongoing constitutional violations. It urges this Court to hold for the first time that relief remedying an ongoing constitutional violation is available only if the plaintiff first satisfies the policy or custom test developed in the context of claims for damages. There is no warrant in precedent or in *Monell*'s rationale for introducing such a limitation.

B. The Court's Decision In *Monell*.

Monell addressed two distinct questions. First, whether municipalities were among the "persons" subject to liability under Section 1983. Second, how Section 1983's causation requirement applied in claims against municipalities.

1. Municipal liability under Section 1983

The principal question before the Court in *Monell* was whether to overrule *Monroe* v. *Pape*, 365 U.S. 167 (1961), which held municipalities immune from suit under Section 1983. The Court first reassessed the legislative history on which *Monroe* had relied. It focused in particular on Congress's rejection of the Sherman amendment, which would have given persons injured by mob violence a cause of action for damages against a municipality that failed to protect them from the mob. *Monell*, 436 U.S. at 669-83.

The Court concluded that Congress did not reject the amendment because it subjected municipalities to damages liability, but rather because it imposed on municipalities a new obligation to keep the peace, something that was beyond the authority of the federal government: "by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, [the amendment] attempted to impose obligations on municipalities by indirection that could not be imposed directly." *Monell*, 436 U.S. at 679.

After ascertaining that other aspects of the legislative history supported including municipalities within the scope of the "persons" subject to liability under Section 1983 (*Monell*, 436 U.S. at 683-89), the Court determined that "the legislative history * * * compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690.

Elaborating on that conclusion, the Court stated:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Monell, 436 U.S. at 690 (footnote omitted). The Court went on to explain that "local governments, like every other [Section] 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal

approval through the body's official decisionmaking channels." *Id.* at 690-91.

Those statements made clear that municipalities—like every other defendant subject to suit under Section 1983—are potentially liable for any act taken "under color of state law." Indeed, the Court cited its decision in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), in which it explained the "color of state law" requirement. 436 U.S. at 691.

Thus, *Monell*'s express reference to actions for Section 1983 suites for "monetary, declaratory, or injunctive relief"—quoted above—relates to the Court's holding that municipalities are liable under the provision as long as the state action requirement is satisfied. The Court was emphasizing that the broad concept of state action applicable to other Section 1983 defendants applied to municipalities as well.[13]

2. Section 1983's causation requirement

The Court next turned to the second question: whether a municipality could be held liable on a *respondeat superior* theory.

This issue arose because *Monell* involved only a claim for retrospective monetary relief. The plaintiffs had challenged on constitutional grounds a municipal policy requiring all pregnant employees to take unpaid leaves of absence, even if such a leave was

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[13] Petitioner is therefore wrong in intimating (Br. 24) that this statement somehow relates to the standard for establishing causation discussed in the next portion of the opinion.

not required for medical reasons.[14] They initially sought "injunctive relief and backpay for periods of unlawful forced leave." *Monell*, 436 U.S. at 661.

After the complaint was filed, the municipal defendants changed their policies to require a pregnant employee to take leave only if medically unable to perform her job. The district court held for that reason that the claims for injunctive and declaratory relief were moot. *Monell*, 436 U.S. at 661. As the case came to this Court, therefore, backpay was the sole relief sought by the plaintiffs. The Court had to determine whether such a claim could be based solely on *respondeat superior* principles or whether some additional showing of municipal involvement was required.

The Court began its analysis by observing that Section 1983's text imposes liability on any person who "shall subject, or cause to be subjected" another to the deprivation of rights secured by the Constitution. *Monell*, 436 U.S. at 691 (internal quotation marks and emphasis omitted). It stated that this language "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692.

"Equally important," the Court said, "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposi-

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[14] This Court held such policies violative of the Due Process Clause in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 651 (1974).

tion of such an obligation unconstitutional." *Monell*, 436 U.S. at 693. It concluded that

> a local government may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983.

Id. at 694.

The Court found that the claim before it "unquestionably involves official policy as the moving force of the constitutional violation" and cautioned that it had "no occasion to address, and [did] not address, what the full contours of municipal liability under [Section] 1983 may be. * * * [W]e expressly leave further development of this action to another day." *Monell*, 436 U.S. at 694-95.

C. The Policy Or Custom Requirement Elucidated By *Monell*'s Progeny Is Tied To The Particular Characteristics Of Claims For Retrospective Compensatory Relief.

Every case since *Monell* in which the Court has addressed the Section 1983 causation issue has involved *only* claims for damages. See *Bd. of Cnty. Comm'rs* v. *Brown*, 520 U.S. 397, 403 (1997); *Collins* v. *City of Harker Heights*, 503 U.S. 115 (1992); *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 117 (1988) (plurality opinion); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986); *Oklahoma City* v. *Tuttle*, 471

U.S. 808, 810 (1985). See also *Tuttle*, 471 U.S. at 810 (characterizing *Monell* as addressing damages liability).

That is not surprising. The risk of imposing liability on a *respondeat superior* theory arises in the context of claims for retrospective relief.

Most claims for compensatory relief involve situations in which the municipal employee exercised his or her discretion in a manner alleged to violate the Constitution and the plaintiff seeks damages based on the injury inflicted by the employee. For example, a claimant may seek damages from law enforcement officers for illegal searches or the use of illegal force, in violation of the Fourth Amendment. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372 (2007). Or a claimant may seek damages because a prison official used excessive physical force in violation of the Eighth Amendment. See, *e.g.*, *Hudson v. McMillian*, 503 U.S. 1 (1992). In these situations, the policy or custom requirement protects the municipality from damages claims.

Sometimes, however, a claimant will seek to argue that a municipality's policies or customs gave rise to the constitutional deprivation, perhaps because the municipality failed to train, warn, or screen its employees adequately (see *Bd. of Cnty. Comm'rs*, 520 U.S. 397; *Collins*, 503 U.S. 115), or perhaps because it issued a policy that itself violates the Constitution (see *Praprotnik*, 485 U.S. 112). The municipality may be held only liable only if the plaintiff can satisfy the policy or custom standard developed in *Monell*'s progeny. The principles recognized in those cases restrict claims for damages against a municipality to those circumstances in

which the municipality can be said to have caused—in whole or in part—the constitutional violation.

This particular focus on claims for damages stems in large part from the economic burden that *respondeat superior* liability would place on municipalities. Indeed, commentators agree that *Monell*'s adoption of the policy or custom standard resulted from concern about subjecting municipalities to numerous suits for damages—a risk that States did not face because of the limited scope of *Ex parte Young*. See, *e.g.*, Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. Cal. L. Rev. 539, 542 (1989); Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409, 413 n.15 (1978) (describing *Monell*'s holding as a "response to the fiscal plight of municipal corporations"); George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on* City of Oklahoma City v. Tuttle *and* Pembaur v. City of Cincinnati, *The "Official Policy" Cases*, 27 B.C. L. Rev. 883, 896 (1986) (suggesting that the *Monell* majority "was indeed concerned with the impact of section 1983 lawsuits on municipal treasuries and eschewed loss-spreading arguments precisely because those who would bear the loss would ultimately be the taxpayers").[15]

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[15] Even the *Monell* Court's explanation of its reasons for rejecting justifications for respondeat superior liability were tied to the characteristics of damages claims. The first justification concerned "the common-sense notion that * * * accidents might nonetheless be reduced if employers had to bear the *cost* of accidents" (*Monell*, 436 U.S. at 693 (emphasis added))—in other words, liability for damages. Clearly, this justification relates to

Petitioner recognizes that all of this Court's post-*Monell* cases "concerned claims for damages" for past constitutional violations, but asserts that "that is a distinction without a difference." Pet. Br. 36. As we next discuss, however, the difference between retrospective compensatory relief and prospective relief to remedy an ongoing constitutional violation is a distinction that makes a considerable difference.

D. A Separate Policy Or Custom Requirement Is Not Necessary To Ensure The Presence Of The Requisite Causal Link In Cases Involving Prospective Relief For Ongoing Constitutional Violations.

The reasons for applying a separate policy or custom requirement in the context of damages actions do not support its expansion to claims for prospective

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liability for damage awards. The second justification posited "that the cost of accidents should be spread to the community as a whole on an insurance theory" (*id.* at 693-694)—an economic hypothesis relating to damages awards and other compensatory relief, not to injunctive or declaratory relief.

And the legislative history cited by the Court—in particular the rejection of the Sherman amendment—also related to damages claims. The amendment would have created a cause of action allowing plaintiffs injured by private "persons riotously assembled" to recover *damages* against the local municipality, regardless of whether the municipality "was in any way at fault for the breach of the peace for which it was to be held for damages." *Monell*, 436 U.S. at 666, 681 n.40 (internal quotation marks omitted). Senator Sherman himself lauded the bill's potential to hold municipalities financially "'responsible'" for damage inflicted from Ku Klux Klan-affiliated rioters. *Id.* at 667 & n.16 (quoting Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (the "Globe")). Opponents of the measure "were unwilling to impose *damages liability* for nonperformance of a duty [to keep the peace] which Congress could not require municipalities to perform." *Id.* at 668 (emphasis added).

relief such as the one in the present case. No separate requirement is necessary in this context because the additional legal standards applicable to a claim for prospective relief—necessitating proof of standing to obtain prospective relief and entitlement under the standards governing entry of that relief (standards not applicable to damages claims)—themselves ensure that a plaintiff will only obtain prospective relief for a constitutional violation that is caused by municipal policy. In addition, the municipality's position in the litigation, defending the ongoing conduct challenged as unconstitutional, itself establishes a link between the municipality and the plaintiff's injury.[16]

1. *Other legal prerequisites for grants of prospective relief establish a causal link between the plaintiffs' injury and a municipal policy or custom.*

The Court has explained that the purpose of the "policy or custom" rule is to ensure that a municipality will not be held liable under Section 1983 "unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights." *Bd. of Cnty. Comm'rs*, 520 U.S. at 400, 403 (emphasis in original). "The 'official

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[16] Of course, a plaintiff seeking both prospective and retrospective relief would have to make the separate showing required by this Court's post-*Monell* decisions in the damages context to establish the requisite causation for his damages claim. That is precisely what occurred in this case, where the court of appeals "remand[ed] to the district court to determine the County's liability under *Monell*" as part of the lower court's consideration of respondent's damages claim against the County. Pet. App. 72

policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 U.S. at 479 (emphasis in original). This requirement implements in the damages context Section 1983's statutory requirement that the defendant "subject[], or cause[] to be subjected" another person to a deprivation of constitutional rights. 42 U.S.C. § 1983.

Meritorious claims for prospective relief with respect to a constitutional violation will—because of standing requirements and the principles governing issuance of prospective relief—necessarily demonstrate that the municipality has caused the challenged injury. No separate showing based on the standard developed in damages cases is necessary.

a. Under Article III standing principles, a claimant may obtain prospective relief only upon a showing that "he is likely to suffer future injury." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). In the context of municipal defendants, this standing requirement generally may be satisfied in one of two ways: a claimant either demonstrates that a discrete injury is substantially likely to recur in the future *or* that the injury is continuing. In both situations, standing to seek prospective relief will necessarily demonstrate a causal link between municipal policy or custom and the plaintiff's ongoing harm.

When a discrete injury has occurred in the past—such as where an officer is alleged to have used excessive force or to have exceeded Fourth Amendment limitations on reasonable searches—a plaintiff may establish standing to seek prospective relief against a municipality only by showing that

the discrete injury is likely to recur. Because this requires substantially more than mere happenstance, the standing test necessarily requires a court to find municipal causation.

In *Lyons*, the claimant sought injunctive and declaratory relief against the city in order to limit the future use of chokeholds by police officers. 461 U.S. at 98. But this Court found that the claimant lacked standing: "[t]hat Lyons may have been illegally choked by the police on October 6, 1976 * * * does nothing to establish a real and immediate threat that he would again be stopped * * * by an officer * * * who would illegally choke him into unconsciousness." *Id.* at 105. Rather, "[i]n order to establish an actual controversy," Lyons was obligated to show not only that he was likely to encounter the police again, but also "(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter * * * or, (2) that the City ordered or authorized police officers to act in such a manner." *Id.* at 105-06 (emphasis in original). In other words, Lyons had to demonstrate why he "might be realistically threatened by police officers who acted within the strictures of the City's policy." *Id.* at 106.

A claimant, like Lyons, seeking injunctive relief against a municipality for a rights deprivation that occurred in the past must show that the violation stemmed from either a municipal custom (*e.g.*, that *all* officers *always* choke citizens) or a municipal policy (*e.g.*, that the municipality "ordered or authorized" police officers to choke citizens). Absent such a showing of causation, an individual claimant lacks standing to seek prospective relief against a municipality based on a past violation of a constitutional right.

In other situations, however, a constitutional violation does not occur at a discrete moment in time, but rather is continuing. For example, a prisoner may be subject to unconstitutional conditions of confinement; the violation occurs until the unconstitutional conditions are remedied. See *Hutto* v. *Finney*, 437 U.S. 678, 687-88 (1978). Or a municipality continues to violate constitutional rights while it operates segregated recreational facilities. See *Watson* v. *City of Memphis*, 373 U.S. 526, 528 (1963). In these cases, a claimant seeks prospective relief not to remedy an injury that is likely to occur in the future, but instead to alleviate a constitutional deprivation that is ongoing.

A continuing violation by its very nature takes on the character of municipal policy. In *Watson*, therefore, injunctive relief was proper against the municipality solely based on the finding that the city continued to maintain segregated facilities; the continuing violation was, in effect, sufficient to demonstrate that the municipality had a policy or custom in violation of the Constitution. 373 U.S. at 533-34. These continuing violation cases, therefore, inherently challenge municipal policy or custom.

Similar considerations are reflected in the general standards guiding issuance of injunctive and declaratory relief against municipalities. In order for moving party to be entitled to injunctive relief, "[t]he necessary determination is that there exists some cognizable danger of recurrent violation." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Issuance of prospective relief against a municipality, therefore, requires a movant to demonstrate more than simply a *prior* constitutional violation; rather,

the movant must demonstrate a clear basis to indicate that the danger will recur.

Indeed, in a Section 1983 case (a case that motivated the *Monell* Court's decision to overrule *Monroe* v. *Pape*, *see Monell*, 436 U.S. at 663 n.5 & 691 n.54), this Court explained that prospective relief must be tied to "the nature and scope of the constitutional violation" and should not burden "governmental units that were neither involved in nor affected by the constitutional violation." *Milliken* v. *Bradley*, 433 U.S. 267, 280, 282 (1977).

And these same limitations are reflected in the standards controlling declaratory relief in the context of lawsuits seeking prospective remedies. Declaratory relief is only appropriate in cases where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969) (internal quotation marks omitted). Thus, like injunctive relief, declaratory relief issued in this context is tied to remedying future constitutional violations. A claimant who only offers speculative predictions as to ongoing and in some situations future injury "does not create the actual controversy that must exist for a declaratory judgment to be entered." *Lyons*, 461 U.S. at 104. Instead, declaratory relief is appropriate in cases where there is a "claimed continuing violation of federal law." *Green* v. *Mansour*, 474 U.S. 64, 73 (1985).

Because claims for prospective relief against municipalities necessarily require a causal link (unlike damages claims, which incorporate no such causal link absent a "custom or policy" requirement), there is no risk that prospective relief against continuing

violations would ever rest on *respondeat superior* liability. Instead, prospective municipal relief will *always* stem from a situation that involves a continuing injury sanctioned by the municipality, municipal policy, or widespread municipal custom. The creation of a separate policy or custom requirement accordingly would serve no purpose.

b. The requisite causation is also demonstrated by the litigation posture taken by the municipality.

Once a local government has become aware through the filing of a lawsuit of the ongoing denial of a constitutional right, its decision to continue to engage in the challenged conduct—and defend the lawsuit—itself constitutes a municipal policy that is the moving force behind the continuation of the deprivation of constitutional rights. The decision to continue engaging in the challenged conduct and to defend its constitutionality in court demonstrates the very "deliberate indifference" that the Court has found sufficient to satisfy the causation requirement. See *City of Canton*, 489 U.S. at 391. By defending a suit against the claim instead of remedying the violation (and thus mooting the claim), the municipality has caused the continuing injuries.

Here, Los Angeles County has been aware since the filing of this lawsuit in 2002 that respondents contend that they are suffering an ongoing violation of their due process rights. The County has decided not to change its conduct but instead to argue in court that it is not obligated to provide adequate process for the removal of respondents' names. Even after the court of appeals found the County in viola-

tion of the Constitution, the County continued to adhere to that position.[17]

* * * *

The inherent characteristics of successful claims for prospective relief from ongoing constitutional violations thus automatically establish the causal link that Section 1983 requires. The municipality's liability in such a lawsuit does not rest "solely on the basis of the existence of an employer-employee relationship with a tortfeasor" (*Monell*, 436 U.S. at 692) and therefore satisfies the causation test.[18]

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[17] The County's assertion (Pet. Br. 40-41) that a causal link has not been established here is nonsensical. The court of appeals explained that the County had the power to craft procedures to allow the Humphries to challenge their continued inclusion in the Index (Pet. App. 72), but that it instead made Detective Wilson "investigator, prosecutor, judge, and jury" with respect to that question. *Id.* at 58. The County's continued refusal to exercise that authority to revise its procedures along the quite detailed lines specified by the court of appeals (see *id.* at 68)—which supports respondents' standing to seek prospective relief and gave rise to the court of appeals' decision awarding the equivalent of declaratory relief, as well as the County's continued resistance in court, plainly suffices to establish that County is the "moving force" behind the refusal to provide respondents with due process.

[18] Petitioner points (Br. 31-32) to the *Monell* Court's reference (436 U.S. at 693 n.58) to *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976). But *Rizzo* involved a claim that "in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to the members of the classes they represented." *Id.* at 371 (emphasis added). That differs dramatically from the situation here, in which the plaintiffs before the court are suffering a *continuing* violation of *their* constitutional rights as a result of *ongoing* conduct that the municipal defendant is aware of as a result of the filing of the lawsuit.

2. *Requiring a separate showing of a policy or custom under the standard applicable to damages claims would restrict the availability of judicial relief and encourage municipalities to ignore ongoing constitutional violations.*

Imposing a separate "policy or custom" requirement in the context of claims involving continuing constitutional violations is not simply unnecessary; transferring the standard from the damages context would deprive courts of the power to stop continuing violations of constitutional rights in a variety of situations and, in addition, will give municipalities a significant incentive to turn a blind eye to ongoing constitutional violations.

To begin with, petitioner points out (Br. 42 & n.6) that some courts have held that a municipality may not be held liable for damages when the challenged actions are required by state law—on the theory that there is no *municipal* policy or custom. Whatever the merits of this principle in the context of damages claims, it would create considerable uncertainty with respect to claims for prospective relief.

How would a plaintiff proceed with respect to an unconstitutional state statute that provides for enforcement by the State's municipalities? Because the State does not enforce the statute, obtaining prospective relief against it would not remedy the ongoing violation of the plaintiff's rights. But a municipality would argue that—because there is no municipal policy or custom causing the violation—it is immune from prospective relief. That outcome would leave the individuals suffering continuing injury to their

constitutional rights without any means of remedying that ongoing violation.

Indeed, that appears to be petitioner's position in this case. It claims that it is not subject to prospective relief because it is executing a state policy, not a policy of its own making. See Pet. Br. 41-42.

And that result would be repeated in a myriad of different settings. For example, the school board defendants in the three cases decided in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), each were required by state law to maintain segregated school systems. See *id.* at 486 n.1. Under petitioner's view, those school boards should have been immune from declaratory and injunctive relief because their actions were compelled by state law. Nothing in this Court's decisions supports that unjustifiable result.

Similarly absurd consequences would result in another set of cases—those in which a municipal employee engages in a continuing violation of the Constitution. Suppose a municipal official refused to issue a marriage license to an interracial couple because of their race, and did so as a result of his own beliefs and in contravention of the locality's nondiscrimination policy.

The official's conduct would clearly violate the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1 (1967). Under petitioner's theory of Section 1983, however, the couple would not be able to obtain declaratory or injunctive relief in an action against the municipality seeking an injunction ordering issuance of the marriage license—because the employee's continuing refusal is not linked to a municipal policy or custom, such relief would be precluded.

And petitioner argues that such relief also would be precluded in an official capacity suit against the particular official refusing to grant the marriage license, contending that official capacity actions also are subject to *Monell*'s policy or custom requirement. See Pet. Br. 43-46.

This inability to remedy an ongoing constitutional violation could arise in numerous contexts. A municipal employee charged with processing construction permits could refuse to issue them to religious institutions or discriminate on other grounds prohibited by the Constitution. Or an employee responsible for purchasing could discriminate on those grounds. In each case, petitioner's approach would preclude courts from granting prospective relief remedying the ongoing violation of constitutional rights.

Indeed, under petitioner's rule, a municipality that becomes aware of an ongoing constitutional violation by one of its employees would have a strong incentive to do nothing. If a policymaking level official were to investigate the matter and decline to act, that course of conduct might open the door to an argument that the municipality's "deliberate indifference" to the ongoing violation—demonstrated by its investigation and decision not to change its conduct—sufficed to satisfy the *Monell* test. See *City of Canton*, 489 U.S. at 391 ("'deliberate indifference' to the rights of its inhabitants" can satisfies *Monell*). Declining to investigate therefore would be the best way to avoid Section 1983 liability, especially because the municipality would be able to argue, if petitioner were to prevail here, that the knowledge of an ongoing violation obtained as a result of the filing

of a lawsuit, and failure to act to remedy the violation, does not satisfy *Monell*.

Another adverse consequence that would flow from adopting petitioner's approach here is significant confusion about the *Monell* test, especially in the context of a municipality's failure to act. This Court's decisions indicate the difficulties presented by those questions. See, *e.g.*, *Bd. of Cnty. Comm'rs*, 520 U.S. 397; *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Tuttle*, 471 U.S. 808.

Now, courts would have to confront those questions in the context of claims involving ongoing constitutional violations and prospective relief. The anomalous results discussed above could lead courts may begin to lower the threshold for finding "deliberate indifference" or for finding a "custom" in order to avoid situations in which plaintiffs suffering continuing injuries from ongoing constitutional violations are left without a remedy. Because the same standard would be applied to claims seeking retrospective compensatory relief, a decision in favor of petitioner here could have the ironic effect of expanding municipalities' exposure to damages liability.

These adverse consequences—which result from applying to claims for prospective relief a standard developed to fit the particular, and very different, characteristics of damages actions—can be avoided by declining to expand the *Monell* standard beyond claims for compensatory relief, and holding that when a plaintiff seeks declaratory or injunctive relief for an ongoing constitutional violation—a violation that continues to inflict cognizable harm on the plaintiff—a separate showing of municipal responsibility is not required. The municipality's continuation of the conduct in the face of the lawsuit chal-

lenging the ongoing conduct's constitutionality, combined with the standards that a court must apply in awarding declaratory or injunctive relief, are sufficient to ensure the requisite connection between the municipality and the challenged conduct.[19]

3. *Prospective relief against States does not require a separate policy or custom showing, and there is no basis for according municipalities greater leeway than States to engage in continuing violations of the Constitution.*

Transferring to the prospective relief context the causation standard developed for damages claims would also create an illogical asymmetry between local and state governments regarding the availability of prospective relief with respect to ongoing constitutional violations.

The Court has explained that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the" *Ex parte Young* doctrine and permit an official capacity action against a state official to go forward without violating the immunity granted to states by the Eleventh Amendment. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 281; see also *Will* v. *Mich.*

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[19] The adverse consequences of the rule proposed by petitioner have not arisen thus far because, as explained in the brief in opposition (at 17-21), petitioner has identified only two appellate decisions endorsing its position. A decision by this Court requiring a separate policy or custom showing, based on the standards developed in the context of damages claims, would have far-reaching effects for the reasons discussed in the text.

Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'") (citation omitted). That is true even though such actions are functionally equivalent to actions against the State employing the named official. *Id.* at 71.

Under petitioner's theory, a party seeking prospective relief against a municipality would bear a greater burden than a party seeking such relief against a State. Only in the action against the municipality would the plaintiff be subjected to the additional burden of separately showing of a link between his injury and a municipal policy or custom. Municipalities do not enjoy sovereign immunity (*Will*, 491 U.S. at 71 n.10)), but States "retain[] 'a residuary and inviolable sovereignty'" (*Printz* v. *United States*, 521 U.S. 898, 919 (1997)). According municipalities greater protection against claims for prospective relief than States therefore makes no sense.

Petitioner argues (Br. 45-46) that the references to *Monell* in *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985), and *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991), establish that a separate showing of policy or custom is required for official capacity actions against state officials. But the Court in these cases simply observed that a causation requirement applies to official-capacity actions. It did not hold that the standard developed in the damages context is an essential prerequisite to obtaining declaratory and injunctive relief with respect to ongoing violations of the Constitution. Indeed, such a conclusion would be inconsistent with the statements in *Coeur d'Alene Tribe* and

Will that suits for prospective relief qualify as official-capacity actions.

The Court's various statements regarding official capacity suits are easily reconciled by the principle discussed above: in an action for prospective relief, the other legal requirements will establish the necessary causal link and a separate showing is not required.

Finally, the consequences of petitioner's approach—under which the policy and custom standard developed in the damages context would also limit the availability of declaratory and injunctive relief in official capacity actions against state officials—would be dramatic. Courts' power to provide relief from state officials' ongoing constitutional violations would be subjected to all of the limitations just discussed. It would not be possible to obtain injunctive relief against a State implementing an unconstitutional federal statute. And ongoing unconstitutional conduct by state officials would be unreachable unless it was tied to an official state policy. That would produce a significant limitation on the accepted scope of available relief in Section 1983 official capacity actions.[20]

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[20] We therefore agree with petitioner that official capacity actions against government officials and actions against municipalities for forward-looking relief against a continuing constitutional violation should be governed by the same standard. But we believe the applicable standard does not include a separate policy or custom requirement because the requisite causal link is necessarily established by the very nature of the claim.

4. Neither legislative history nor general federalism principles justify the County's position.

Petitioner asserts that the legislative history relied upon in *Monell* and general federalism principles each support application of a separate policy or custom requirement in the context of claims for prospective relief. It is wrong on both counts.

With respect to the legislative history, petitioner seems to argue that the conclusions drawn by the *Monell* Court with respect to the Sherman amendment's damages provision justify restrictions on courts' ability to remedy ongoing violations of the federal Constitution. Pet. Br. 38; see also *id.* at 32.

In fact, *Monell*'s analysis of the legislative history expressly rejects this conclusion. The limitation that *Monell* derived from the legislative history was that Congress did not wish to "impose obligations on municipalities by indirection that could not be imposed directly" (436 U.S. at 679)—in particular, an obligation to keep the peace stemming not from state law but from the threat of large damages under a federal cause of action.

The Court in *Monell* made clear that this restriction "put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. * * * So long as federal courts were vindicating the Federal Constitution, they were providing the 'positive' government action required to protect federal constitutional rights and no question was raised of enlisting the States in the 'positive' action." 436 U.S. at 680-81; see also *ibid.* (observing that "Representative Poland * * *, reasoning from Contract Clause precedents, indicated that Congress

could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities liable for using their authorized powers in violation of the Constitution").

Far from supporting petitioner's view, therefore, *Monell*'s analysis of the legislative history confirms Congress's desire to provide a remedy where municipalities either use, or fail to use, their authority in a manner that violates the Constitution.

Petitioner next argues (Br. 38-40) that federalism concerns militate in favor of extending the policy or custom requirement to claims involving ongoing harm from continuing constitutional violations.

But this Court has squarely rejected that contention, holding unanimously that "[t]he Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken*, 433 U.S. at 291; see also *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (Section 1983 altered "the relationship between the States and the Nation with respect to the protection of federally created rights; [Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights").[21]

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[21] The County tries to bolster its federalism argument by pointing out (Br. 40) that claims for prospective relief can have financial consequences. But this Court has repeatedly affirmed that "federal courts [may] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken*, 433 U.S. at 289; see also *Edelman* v. *Jordan*, 415 U.S. 651, 667

To be sure, federal courts must give significant weight to federalism concerns in crafting declaratory and injunctive relief. That is the import of the language from *Rizzo* quoted by petitioner (Br. 39), and the principle has been affirmed repeatedly by the Court. *E.g.*, *Milliken*, 433 U.S. at 280-81; *Horne* v. *Flores*, 129 S. Ct. 2579, 2593-94 (2009).

But petitioner would go beyond that principle and insulate against any prospective remedy at all ongoing unconstitutional conduct that continues to inflict cognizable harm on the plaintiffs before the Court. Given the broad latitude courts have to shape prospective relief, there is no basis in federalism concerns to impose such a dramatic limitation on Section 1983.

That is especially true given the Court's repeated admonition that Section 1983 should be "broadly construed" to further its remedial purpose. *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 105 (1989); *Monell*, 436 U.S. at 686, 706; see also *id.* at 685 n.45 (quoting Globe App. at 81) ("Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be 'the enforcement * * * of the Constitution on behalf of every individual citizen of the Republic * * * to the extent of the rights guarantied [sic] to him by the Constitution'").

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is

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(1974). If that is true for States, which are protected by the Eleventh Amendment, it surely is true for municipalities, which do not enjoy sovereign immunity. *Will*, 491 U.S. at 71 n.10.

clothed with the authority of state law.'" *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (quoting *Monroe*, 365 U.S. at 184). It would be "'uniquely amiss'" if "the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to" continue to violate rights guaranteed by the Constitution, beyond the reach of all prospective judicial relief. *Id.* at 651 (internal quotation marks omitted). But that will be the inevitable consequence of the legal principle urged by petitioner in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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In The Supreme Court of the United States

LOS ANGELES COUNTY, CALIFORNIA,

Petitioner,

vs.

CRAIG ARTHUR HUMPHRIES and
WENDY DAWN ABORN HUMPHRIES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I.

MONELL EXPRESSLY STATES THAT THE POLICY, CUSTOM, AND PRACTICE CAUSATION REQUIREMENT APPLIES TO ALL CLAIMS FOR RELIEF UNDER § 1983, INCLUDING DECLARATORY RELIEF, AND RESPONDENTS OFFER NO COMPELLING REASON TO DEPART FROM THIS ESTABLISHED PRECEDENT.

Monell v. Dep't of Soc. Servs. is not ambiguous on application of its causation standards to all claims for relief under § 1983, including injunctive and declaratory relief:

> Local governing bodies . . . can be sued directly under § 1983 for monetary, *declaratory*, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

436 U.S. 658, 690 (1978) (emphasis added).

Respondents contend that *Monell* does not mean what it says. They assert that the cited passage occurs after the court's consideration of whether a municipality was a person under § 1983 and before its discussion of the causation requirements for such claims, and merely refers to the requirement of state action for liability. (Brief of Respondents ("Br.

Resps.") 23.) This strained construction does not withstand scrutiny.

First, the cited passage is the introductory paragraph to the section addressing causation. It encapsulates the threshold holding that a local entity may be sued under § 1983 and the following conclusion that such claims are limited to injuries inflicted as a result of a policy, custom, or practice.

Second, there is no discussion of policy, custom or practice as being necessary to showing action under color of state law. The citation to *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) is merely with reference to the point that official action may take many forms aside from express policy. *Monell*, 436 U.S. at 691.

Third, in rejecting *respondeat superior* liability, the Court referenced its decision in *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) rejecting injunctive relief against defendants who themselves caused no injury but were sued based upon the actions of subordinates. *Monell*, 436 U.S. at 692, 694 n.58.

Nor does *Monell* distinguish between the types of relief available in § 1983 claims – the court addressed causation within the statutory language of § 1983, noting that the provision's limitation of relief to those circumstances where an entity causes or causes another to violate a constitutional right was not consistent with respondeat superior liability. 436 U.S. at 692.

Respondents do not address this statutory language. Nor do they dispute the fact that *Monell* repeatedly refers to the causation requirement as a prerequisite to *any* relief under the statute: "[A] local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694 (emphasis added). It is only when "execution of a government's policy or custom . . . inflicts the injury that the government as an entity is *responsible* under § 1983." *Id.* (emphasis added).

Nor, as respondents assert, is *Monell* premised on the notion that a policy, custom, or practice requirement is necessary to avoid imposition of devastating financial liability. (Br. Resps. 27.) *Monell* expressly notes that rejection of respondeat superior liability by the drafters of § 1983 was not based on a fear of draining local treasuries. 436 U.S. at 664 n.9. Rather, *Monell* rested its holding on the language of § 1983 viewed against the background of congressional understanding of the coercive power of allowing civil claims and a reluctance to impose obligations on municipalities to control and protect against the conduct of others. (Brief of Petitioner ("Br. Pet.") 28-32.) It is illogical to conclude that drafters concerned about indirectly coercing conduct through damages liability would nonetheless find a lesser standard of causation should be applied to directly coerce conduct through prospective relief.

This Court has repeatedly reaffirmed the *Monell* policy, custom, and practice causation requirement as an important principal of federalism, limiting the

circumstances in which federal courts may intervene in the operation of local governments. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989); *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997). This important limitation is even more vital with respect to the direct control of local entities through issuance of declaratory or injunctive relief. Certainly, nothing in *Monell* or its progeny, or the legislative history of § 1983 remotely supports the sort of standardless view of causation urged by respondents to be applied to claims for prospective relief.

Under the principle of *stare decisis*, this Court is reluctant to overturn established authority, especially authority construing federal statutes, absent a compelling reason to do so. *Runyon v. McCrary*, 427 U.S. 160, 175 n.12 (1976); *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974). Here, respondents offer no such compelling reason. As four Circuits have expressly recognized, for 32 years, *Monell* has plainly stated that the policy, custom, or practice requirement applies to claims for declaratory and injunctive relief. *Greensboro Professional Firefighters Association, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966-67 (4th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332, 1342-47 (11th Cir. 1994); *Dirrane v. Brookline Police Department*, 315 F.3d 65, 71 (1st Cir. 2002); *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007). Only a single circuit has departed from that standard. There is no compelling reason to reconsider *Monell* in this regard.

II.

CAUSATION IS A PREREQUISITE FOR ANY RELIEF UNDER § 1983 AND GENERAL STANDARDS FOR ISSUANCE OF PROSPECTIVE RELIEF ARE NOT A SUBSTITUTE FOR THE SPECIFIC STANDARDS OF CAUSATION OF *MONELL*.

A. Causation Is A Prerequisite For Any Relief Under § 1983, Regardless Of Form.

Faced with the plain language of *Monell*, respondents must engage in rhetorical sleight-of-hand by putting the cart before the horse and attempting to substitute a generalized standing inquiry for *Monell*'s specific causation requirements. Respondents assert:

> Meritorious claims for prospective relief with respect to a constitutional violation will – because of standing requirements and the principles governing issuance of prospective relief – necessarily demonstrate that the municipality has caused the challenged injury. No separate showing based on the standard developed in damages cases is necessary.

(Br. Resps. 30.)

Respondents' argument ignores the fact that the question of whether a defendant caused the plaintiff's injury is always a threshold inquiry in determining standing and whether the plaintiff is entitled to relief of any kind under § 1983. *City of Los*

Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) ["The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' *as the result of the challenged official conduct* and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'"]; emphasis added; *Rizzo*, 423 U.S. at 370-71 ["The plain words of the statute impose liability whether in the form of payment of redressive damages or being placed under an injunction only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of rights secured by the Constitution and laws"].

If no injury has been caused by the defendant then a court need not even get to the question of what remedy would be appropriate. That was the very point in *Rizzo*, where one of the reasons the court found no Article III standing was because the injunction ran against defendants who themselves had not caused plaintiffs' injuries. 423 U.S. at 371 ("[T]here was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners – express or otherwise – showing their authorization or approval of such misconduct").

Respondents' assertion that "[t]he creation of a separate policy or custom requirement . . . would serve no purpose" (Br. Resps. 34) has it backwards. There is no "separate" causation inquiry – causation is always a threshold prerequisite to establish entitlement to any relief, prospective or otherwise.

B. Generalized Standards Concerning Issuance Of Prospective Relief Are Not A Substitute For The Specific Causation Standards Of *Monell* Which Take Into Account Core Principles Of Federalism.

The tenuous basis for respondents' argument is underscored by the fact that they must blow hot and cold on the ease with which the substantive *Monell* requirements may be satisfied in appropriate cases for prospective relief. Thus, in asking the Court to jettison *Monell*'s long-standing and refined standards for liability in claims for prospective relief, they assure the Court that such claims in any event will necessarily meet the policy, custom, or practice standard. (Br. Resps. 34 ["(P)rospective municipal relief will *always* stem from a situation that involves a continuing injury sanctioned by the municipality, municipal policy, or widespread municipal custom" [emphasis in original].)

Yet, on the other hand, respondents elsewhere assert that application of this very same policy, custom, or practice standard will somehow foreclose injunctive relief in appropriate cases. (Br. Resps. 36-39.)

Which is it? Either claims for prospective relief can easily satisfy *Monell*'s specific requirements, hence there is no reason to depart from *Monell*, or respondents are suggesting that federal courts may properly intervene into the operation of local and state governments based on some lesser and

heretofore unarticulated standard. At best, respondents are proposing some sort of vaguely defined *Monell*-lite. If there is any invitation to rampant confusion, it is allowing courts to apply differing causation standards in crafting injunctive, as opposed to damages relief against municipalities. Respondents acknowledge that such differing standards are undesirable. (Br. Resps. 39.) Yet, that is precisely what respondents would spawn with their almost-but-not-quite policy, custom, or practice standard for prospective relief.

This case underscores the mischief wrought by such a rule. First, because it is untethered to any specific standard of causation, the "declaratory relief" *ex post facto* imposed by the Ninth Circuit in rendering the fee award is necessarily imprecise. The court found that plaintiffs had essentially established declaratory relief as against the County because it had "held that the State and County procedures used in maintaining the Child Abuse Central Index . . . were constitutionally insufficient, and thus the Child Abuse and Neglect Reporting Act . . . 'violates the Humphries' procedural due process rights.'" (Appendix to Petition for Certiorari ("App.") 2.) Yet, it is not clear what "procedures" of the County have been declared violative of due process. The procedures in this particular case? Procedures that are the equivalent of a policy for purposes of *Monell*? Surely not the latter, since, as the Ninth Circuit acknowledged, at this stage of the litigation the existence of a policy, custom, or practice under *Monell* has not even been

litigated and remains an open issue. Requiring courts to apply the *Monell* causation requirements assures that any ruling is sharply focused and provides meaningful assistance in resolving the pertinent issues between the parties.

Second, the Ninth Circuit's statement that the County had the power to craft procedures to afford the Humphries due process – which respondents contend established the requisite causal connection as to the County (Br. Resps. 35 n.17) – was made without the careful consideration of state and municipal interests that this court has held are necessarily encompassed in the *Monell* standards.

As noted, the County's power to remedy the violation, i.e., whether it was free under state law to do so, was not at issue before the Ninth Circuit. The sole issue concerned the constitutionality of the statute. Even the Ninth Circuit acknowledged this in the face of the County's rehearing petition which noted that there was a serious issue under state law as to whether the County had the power to alter the statutory scheme – the court made it clear that the ultimate question of *Monell* liability remained open in the district court. (App. 72.) Thus, the court's statement concerning this "causal link" as to the County is not tied to any legal standard whatsoever and made in the face of substantial case authority from both other circuits and within California

concerning the liability of municipalities for enforcing state law.[1] (Br. Pet. 42 n.6.)

Surely, nothing is more invasive than a federal court declaring the circumstances under which a local entity may be sued merely for enforcing state law, or going even further and requiring municipalities to make substantive changes to state statutes. To say that local entities would automatically be liable for prospective relief – including a payment of attorneys' fees both their own, and a successful plaintiff's – could well lead local entities not to enforce state laws that they deem vulnerable to challenge, even under circumstances where there may be a viable defense. Or, if sued for enforcing such laws, immediately settle, even in the face of viable arguments to preserve the law, simply to avoid additional expenditure of and exposure to attorneys' fees, as well as entanglement of federal courts in internal

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[1] In some respects, this issue parallels the concerns the 42nd Congress had with respect to the Sherman Amendment. As noted, Congress was concerned that the Sherman Amendment would impose an obligation on municipalities to enforce state law under circumstances where the state itself had not imposed such an obligation. (Br. Pet. 28-30.) Here, the Ninth Circuit has suggested, without analysis, that the County may be required to rewrite the governing statutes and add additional procedural protections. (App. 72.) Yet, as noted, there is a serious question under California law as to whether a municipality is authorized to do so without reaching into an area preempted by the State. (Br. Pet. 42, n.6.) In short, the State has not simply declined to impose that obligation on municipalities, it has possibly foreclosed them from doing so.

operations. Such a rule would also invite local entities to rewrite state laws to avoid potential claims, therefore eroding the power of state legislatures to set state law.

Under any scenario the result is the same – erosion of a state's ability to enforce and enact its laws, and a severe disruption of the internal operation of state governments and relationship to their municipalities. As this Court has repeatedly noted, these are precisely the sort of considerations that inform the *Monell* requirements. *City of Canton v. Harris*, 489 U.S. at 392; *Bd. of the County Comm'rs v. Brown*, 520 U.S. at 415. Application of the *Monell* standards assures that such intervention only occurs after careful consideration and analysis, and not as a result of an ad hoc, essentially standardless determination in the context of a claim for prospective relief under the Ninth Circuit's rule and under the imprecise standards proposed by respondents.

III.

APPLICATION OF THE *MONELL* REQUIREMENTS ALLOWS PROSPECTIVE RELIEF WHERE A CONSTITUTIONAL VIOLATION IS FAIRLY ATTRIBUTABLE TO THE ACTIONS OF A MUNICIPALITY AND DOES NOT AFFORD "LESS" PROTECTION THAN IS AVAILABLE AGAINST THE STATES.

A. Respondents Do Not Identify Any Circumstance In Which *Monell* Would Foreclose Prospective Relief In An Appropriate Case.

As noted, respondents contend that essentially all claims for prospective relief will necessarily meet the *Monell* requirements in order to satisfy the standards for granting such relief. At the same time, however, respondents labor mightily to concoct situations where, according to them, application of the *Monell* standards to claims for prospective relief would defeat proper redress. Yet, the proffered examples fit neatly within the *Monell* framework making it clear that relief could be afforded in appropriate cases.

Respondents posit an unconstitutional state statute that leaves enforcement to municipalities as the sort of case that would fall between the cracks, because the municipality could argue it is not subject to prospective relief because it is not enforcing municipal policy, but merely state law. (Br. Resps. 36.) As a threshold matter, the question is purely hypothetical here – since the State of California

through its Attorney General is a defendant and the very entity that maintains the database from which respondents want their names removed, as well as the entity that created the statute in question. Respondents can obtain fully effective prospective relief from the State, without regard to any claim against the County. Thus application of the *Monell* requirements to this claim against the County would in no way deprive these plaintiffs of a meaningful remedy.

But even the purest form of the hypothetical falls easily within *Monell* strictures. It may be, as some courts have held, that claims against municipalities based solely upon enforcement of state law are in fact suits against the state itself since the local entity acts purely in a ministerial capacity. *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) (where State Board set mandatory standards for social service employment decision, State Board – not county board – was policymaker with respect to employment decisions); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (county judge acted on behalf of state and not county in enforcing particular state law). This court has recognized that there are circumstances under which many local officials in fact act on behalf of the state and not the local entity in the performance of duties. *McMillian v. Monroe County*, 520 U.S. 781, 793 (1997) (county sheriff in Alabama acts on behalf of the state and not the county for *Monell* purposes). Or it may be a simple matter to establish that a local entity, not surprisingly, has a policy,

custom or practice of enforcing a particular state law, since it would be a rare municipality that would simply disregard state strictures.

Alternatively, it may be a situation where a statute affords some discretion to the local entity, in which case its exercise of that discretion via a policy, custom, or practice could properly give rise to liability under *Monell*. *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364-66 (6th Cir. 1993) (Although state law authorized use of force against fleeing suspect, standards for use of force were prescribed by municipal policy). That appears to be the premise lurking in the background of the Ninth Circuit's statement to the effect that the County could have supplied additional procedures here, albeit made in circumstances where the court acknowledged that compliance with *Monell*'s strictures was an open issue in the case.

As petitioner has noted, there is significant question under California law as to whether it in fact would be free to impose additional protections and if, under those circumstances, the action could be fairly attributable to petitioner or to the State. It is conceivable that the County could eventually lose under application of *Monell*'s strictures. However, as previously explained (*ante* at 9-11) given the significant impact such liability rules have on the internal operations of a state and its municipalities, it is profoundly important to make the appropriate inquiry, applying clear standards.

Respondents also posit hypotheticals where municipal employees reject a license or an application based upon invidious reasons and assert that in such cases the plaintiffs would not be able to obtain an injunction directing the entity to issue the document in question. (Br. Resps. 37-38.) However if a low level official invidiously declines to issue a license and it is brought to the attention of a policymaking official, or an individual to whom such authority has been delegated, the failure to issue a license upon a renewed request would meet the requirements of *Monell*. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 483 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 130 (1988).[2]

Similarly, respondents contend that if a municipality becomes aware of an on-going constitutional violation by one of its employees, it would somehow have strong incentive to do nothing because if the policymaker investigated the matter and declined to act, this would open the door to *Monell* liability. (Br. Resps. 38.) However, evidence that a policymaking official had notice of an ongoing violation and *deliberately* declined to investigate would be "textbook" deliberate indifference of the sort this Court

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[2] Respondents proffer a watered-down version of this sort of *Monell* claim in their contention that "requisite causation is . . . demonstrated by the litigation posture taken by the municipality." (Br. Resps. 34.) Yet, the fact that such claims are easily resolved under *Monell*'s strictures makes it unnecessary to substitute the newly minted and vaguely defined "litigation posture" standard respondents propose.

has indicated would give rise to redress under *Monell*. *See City of Canton v. Harris*, 489 U.S. at 391 ["deliberate indifference to the rights of its inhabitants" may satisfy *Monell*].

B. Application Of The *Monell* Requirements To Claims For Declaratory Or Other Prospective Relief Is Consistent With The Manner In Which The Court Has Treated Official Capacity Claims Against State Officials.

Respondents also contend that application of *Monell* to claims for prospective relief against municipalities affords plaintiffs less protection against constitutional violations than that afforded as against states. (Br. Resps. 21-22.) As petitioner has noted, the premise of this argument – that a plaintiff may obtain injunctive relief against a state official without having to show that the violation was the result of action fairly attributable to the state – is untenable. The court has twice invoked *Monell* in making it clear that official capacity claims for prospective relief against state officials require some showing that the entity is the moving force behind the deprivation in that the entity's police or custom must have played a part in the violation of federal law. (Br. Pet. 9-10), citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Respondents attempt to distinguish *Graham* and *Hafer* on the ground that the court "simply observed that a causation requirement applies to

official-capacity actions." (Br. Resps. 41.) However, respondents ignore the fact that the Court explained what that causation standard was – a showing that the injury subject to the official capacity claim for prospective relief was the result of a policy, custom, or practice attributable to the entity, i.e., the state.

Moreover, respondents point to nothing in this Court's Eleventh Amendment jurisprudence suggesting the availability of prospective relief against a state official, absent some showing of official policy in the form of an unconstitutional statute, or an injury inflicted by a state official to whom final authority has been delegated.

CONCLUSION

Respondents have identified no circumstance in which application of the specific causation standards of *Monell* would bar prospective relief in an appropriate case. To be sure, application of the *Monell* standards may be easy in some cases and difficult in others, but as this Court has repeatedly held, principles of federalism dictate that federal courts undertake this searching inquiry before intervening in the operation of local governments. There is no justification for a departure from *Monell*'s standard of causation in claims for prospective relief. The order of

the Ninth Circuit imposing attorneys' fees should be reversed.

Respectfully submitted,

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